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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 120

JONES MOTOR CO., INC., *Petitioner*

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondent

and

HIGHWAY EXPRESS LINES, INC. and
MODERN TRANSFER COMPANY, INC.,
Intervening Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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CONSTITUTION OF THE UNITED STATES CITED

Article I, Section 8 2

IN THE

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No.

JONES MOTOR CO., INC., *Petitioner*

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
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and

HIGHWAY EXPRESS LINES, INC. and
MODERN TRANSFER COMPANY, INC.,
Intervening Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

Petitioner, Jones Motor Co., Inc., hereinafter referred to as "Petitioner" or "Jones" respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the opinion and Order of the Superior Court of Pennsylvania affirm-

ing an Order of the Pennsylvania Public Utility Commission, allocatur having been denied by the Supreme Court of Pennsylvania.

OPINIONS BELOW

The per curiam Order of the Supreme Court of Pennsylvania denying Petitioner's petition for allocatur is docketed at No. 123-A Miscellaneous Docket and is reproduced in full text as Appendix I to this Petition. The opinion and Order of the Superior Court of Pennsylvania is reported as Jones Motor Co., Inc. v. Pennsylvania Public Utility Commission, No. 53 March Term, 1959, 188 Pa. Superior Ct. 449, 149 A. 2d 491, and is reproduced in full text as Appendix II to this petition. The Order of Pennsylvania Public Utility Commission in "Pennsylvania Public Utility Commission v. Jones Motor Co., Inc." at C. 16813 is reproduced in full text as Appendix III to this petition.

JURISDICTION

Petitioner seeks review of the opinion and Order of the Superior Court of Pennsylvania filed March 18, 1959, petition for allocatur to the Supreme Court of Pennsylvania having been denied. Jurisdiction of this Court is invoked under Title 28, U.S.C., section 1257(3).

QUESTIONS PRESENTED

(1) May a state agency lawfully issue a cease and desist order on a motor common carrier directing it to cease interstate operations conducted in accordance with the carrier's interstate certificates of public convenience and necessity issued by the Interstate Commerce Commission?

(2) Is a cease and desist order, issued by a state agency, directing cessation of interstate motor common carrier operations authorized by the Interstate Commerce Commission in conflict with Part II of the Interstate Commerce Act and in contravention of the "Commerce clause" of Article I, Section 8 of the Federal Constitution?

(3) Must a state agency, which challenges the operations of a certificated interstate motor common carrier, seek relief from the Interstate Commerce Commission as provided in Section 204(c) of Part II of the Interstate Commerce Act and in accordance with the decision of your Honorable Court in *Service Storage and Transfer Co.* v. *Commonwealth of Virginia*, No. 92 October Term, 1958, decided March 30, 1959?

STATUTES INVOLVED

Interstate Commerce Act, Part II, Section 203(a)(10); Title 49, U.S.C., Section 303(a)(10):

> "The term 'interstate commerce' means commerce between any place in a state and any place in another state or between places in the same state through another state, whether such commerce moves wholly by motor vehicle or partly by motor vehicle or partly by motor vehicle and partly by rail, express, or water."

Interstate Commerce Act, Part II, Section 204(c); Title 49, U.S.C., Section 304(c):

> "Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provisions of this chapter or with any

requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of the opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint."

Interstate Commerce Act, Part II, Section 212(a); Title 49, U.S.C., Section 312(a):

"Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, for willful failure to comply with any provision of this chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: Provided, however, That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 304(c) of this title, commanding obedience to the provision of this chapter, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: And provided further, That the right to engage in transportation in interstate or

foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of sections 306, 309, or 311 of this title, or by virtue of the second proviso of section 306(a) of this title or temporary authority under section 310a of this title, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of sections 311(c), 317(a), or 318(a) of this title or with any lawful order, rule, or regulation of the Commission promulgated thereunder."

Public Utility Law of May 28, 1937, P. L. 1053, Section 202(b) and (c); 66 Purdon's Statutes 1122:

"Upon approval of the commission, evidenced by its certificate of public convenience first had and obtained, and upon compliance with existing laws, and not otherwise, it shall be lawful:

(b) For any public utility to renew its charter, or obtain any additional right, power, franchise, or privilege, by any amendment or supplement to its charter, or otherwise.

(c) For any public utility to begin the exercise of any additional right, power, franchise, or privilege."

Interstate Commerce Act, Part II, Section 302(b); Title 49, U.S.C., Section 302(b):

"Nothing in this chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

STATEMENT OF THE CASE

The Material Facts

The material facts in the instant matter are as follows: Petitioner has been operating since 1952 under certificates of public convenience and necessity issued by the Interstate Commerce Commission at Dockets MC 4963 and MC 4963, Sub 7, combined in accordance with specific authority granted by the Interstate Commerce Commission in proceedings docketed at MC-F-4955 approving the transfer to Petitioner of its authority at MC 4963, Sub 7. In conducting operations under these certificates, combined as aforesaid, Petitioner has handled traffic moving between Pennsylvania points in its authorized Allentown area, on the one hand, and its authorized Philadelphia area, on the other. In addition, interstate interline traffic to and from other carriers and traffic destined to points on the specified routes, not situated in Pennsylvania, likewise is handled. All traffic is transported pursuant to published interstate routes and published interstate rates. All traffic between the Philadelphia area authorized to Petitioner and the Allentown area authorized to Petitioner is handled via Clinton, New Jersey, the point of combination of the certificated authorities in question.

On August 5, 1957 Pennsylvania Public Utility Commission instituted a complaint proceeding against Petitioner averring operations without a certificate of public convenience and necessity issued by said Commission in violation of Sections 202(b) and 202(c) of the Public Utility Law of Pennsylvania. Both Pennsylvania Public Utility Commission and the Intervenors contended that the traffic handled by Petitioner between the Philadelphia and Allentown areas consti-

tuted intrastate commerce. Petitioner defended on the ground that the transportation was interstate in nature, was performed by it pursuant to its interstate certificates and hence was beyond the jurisdiction of Pennsylvania Public Utility Commission. Pennsylvania Public Utility Commission issued a cease and desist order against Petitioner. Petitioner appealed to the Superior Court of Pennsylvania, which affirmed the Order of Pennsylvania Public Utility Commission. Petitioner then filed a petition for allowance of appeal with the Pennsylvania Supreme Court and said Court denied allocatur.

Petitioner's Contentions

(1) Petitioner has contended and continues to contend that the transportation, which is the subject of this proceeding, is interstate commerce within the purview of Section 203(a)(10), which reads as follows:

> "The term 'interstate commerce' means commerce between any place in a state and any place in another state or between places in the same state through another state, whether such commerce moves wholly by motor vehicle or partly by motor vehicle or partly by motor vehicle and partly by rail, express, or water."

(2) Petitioner's second contention was and is that Pennsylvania Public Utility Commission lacks jurisdiction over the transportation in question. In support of this contention, Petitioner invites attention to the decision of the Interstate Commerce Commission in *Atlantic Freight Lines, Inc.—Petition for Declaratory Order*, MC 77477, 51 M.C.C. 175, wherein the Commission stated:

> ". . . primary jurisdiction to determine the bona fides of interstate transportation is vested in this Commission." (51 M.C.C. 186)

Pennsylvania Superior Court has recognized this contention in *Atlantic Freight Lines, Inc.* v. *Pennsylvania Public Utility Commission,* 163 Pa. Superior Ct. 215, 60 A. 2d 589, when it stated:

> "And when the Interstate Commerce Commission under authority vested in it by Congress has authorized transportation over a stated route, even between two points in the same state, its order designating the movement as interstate commerce is binding on the state and cannot be questioned collaterally. Nevin Bus Lines, Inc., et al. v. Public Service Comm., supra; Cf. United States v. Yohn, D.C., 275 F. 232, affirmed in 2 Cir., 280 F. 511."

(3) Petitioner's third contention was answered by your Honorable Court in *Service Storage and Transfer Co., Inc.* v. *Commonwealth of Virginia,* No. 92 October Term, 1958, decided March 30, 1959, wherein it cited with approval *Castle* v. *Hayes Freight Lines,* 348 U.S. 61, 63-64 (1954):

> "In Castle v. Hayes Freight Lines, 348 U.S. 61, 63-64 (1954), we observed that 'Congress in the Motor Carrier Act adopted a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce.' We pointed out that 49 U. S. C. § 312 provides 'that all certificates, permits or licenses issued by the Commission "shall remain in effect until suspended or terminated as herein provided" . . . . Under these circumstances, it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted right to operate.'" (at page 5)

and also stated:

> "Finally, the Commonwealth is not helpless to act. If it believes that petitioner's operation is not bona fide interstate but is merely a subterfuge to escape its jurisdiction, it can avail itself of the remedy Congress has provided in the Act. Section 204(c), supra, note 2, authorizes the filing of a 'complaint in writing to the Commission by any . . . State board . . . (that) any . . . carrier . . .' has abused its certificate. See also Castle v. Hayes Freight Lines, supra. Thus the possibility of a multitude of interpretations of the same federal certificate by several States will be avoided and a uniform administration of the Act achieved." (at page 8)

THE FEDERAL QUESTION WAS RAISED IN TIME AND IN PROPER MANNER

The Federal question was initially raised by Petitioner in its answer to the complaint upon Commission notice which instituted this proceeding. Throughout the conduct of the proceedings before Pennsylvania Public Utility Commission Petitioner continued to raise the Federal question.

In its Order and opinion, Pennsylvania Public Utility Commission, in issuing its cease and desist order, relied upon *Service Storage and Transfer Co., Inc.* v. *Commonwealth of Virginia,* 199 Va. 797, 102 S. E. (2) 339 (1958) and stated:

> "The Supreme Court of Appeals of Virginia recently affirmed a holding of the Virginia Commission that a carrier serving two points within a state does not escape state regulation by following a circuitous route into another state and back again for the purpose of evading such regulation; and that state regulation depends upon whether the

movement is bona fide, of which the test is whether an ordinarily prudent carrier not restrained by regulation would use the interstate route: Virginia v. Service Storage & Transfer Co., 14 PUR (3d) 218 (1956); affirmed sub nom. Service Storage & Transfer Company, Inc. v. Commonwealth of Virginia, 199 Va. 797, 102 S.E. (2) 339 (1956). Applying this test to the instant case, wherein the evidence clearly shows that the 'normal or usual' routes were not followed between the Pennsylvania points, there is no doubt in our minds that the shipments in question are amenable to the jurisdiction of this Commission."

thereby recognizing that a Federal question did exist.

Pennsylvania Public Utility Commission further recognized the existence of a Federal question when it stated:

"Of course, regulation of interstate highway transportation is vested in the Interstate Commerce Commission by the Federal Motor Carrier Act of 1935, 49 U.S.C.A., Section 301, et seq. However, such regulation does not authorize a motor carrier to do an intrastate business on the highways of any state or otherwise interfere with the exclusive exercise of a state's power to regulate intrastate commerce: 49 U.S.C.A., Section 302(b); Ryan, et al. v. Pa. P.U.C., 142 Pa. Superior Ct. 517, 17 A.2d 637, 39 PUR(NS) 455 (1940), allocatur to the Supreme Court refused and certiorari to the United States Supreme Court denied 314 U.S. 640, 62 S. Ct. 80, 86 L. Ed. 514 (1941); Atlantic Freight Lines v. Pa. P.U.C., 163 Pa. Superior Ct. 215, 60 A.2d 589 (1948), allocatur to Supreme Court refused, certiorari denied to the United States Supreme Court 336 U. S. 925, 69 S. Ct. 656, 93 L. Ed. 1087 (1949); Clark v. The Public Service Commission, 209 Md. 121,

120 A.2d 363 (1956); Eichholz v. The Public Service Commission of the State of Missouri, 306 U. S. 268, 59 S. Ct. 532, 83 L. Ed. 641, 27 PUR (NS) 288, rehearing denied 306 U. S. 622, 669, 83 L. Ed. 1063 (1939); and Central Greyhound Lines v. Mealey, 334 U. S. 653, at 660, 68 S. Ct. 1260, 92 L. Ed. 1633 (1947)."

The Federal issues involved were likewise advanced by Petitioner in its argument before the Superior Court of Pennsylvania, wherein the following questions, inter alia, were argued:

"1. Is the transportation here involved interstate commerce?

2. Where operations are conducted pursuant to a valid certificate, issued by the Interstate Commerce Commission, may an instrumentality of a State interfere therewith?

3. Is there any substantial, credible evidence of subterfuge?"

The Superior Court of Pennsylvania also recognized the existence of the Federal question when, in the course of its opinion, it stated:

"Thus the Congress has asserted a hands-off policy by expressly recognizing the power of each State to regulate commerce within its borders. Eicholz v. Public Service Commission, 306 U.S. 268, 59 S. Ct. 532 was a case in which the Commission had revoked Eicholtz' carrier permit on a finding that he had unlawfully engaged in intrastate commerce under the pretense of transacting interstate business. On appeal the District Court from the evidence found that the carriage of property from Missouri into Kansas and thence back into Missouri for delivery there was not 'the normal,

> regular, or usual route for shipping merchandise between the two cities in Missouri: and the court accordingly refused to issue a permanent injunction restraining the State Commission from prosecuting actions against Eicholtz for using State Highways in the transporting of property for hire in interstate commerce. On appeal, the Supreme Court of the United States in affirming the order said: 'We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected.'"

and again, when it stated:

> "In this case the evidence was entirely sufficient to support the findings of the Commission that the Interstate Commerce Commission had not assumed jurisdiction of carrier transportation between two points in Pennsylvania, via New Jersey and that the movement by respondent across the State line was but a subterfuge to evade the State's requirements as to intrastate commerce. Atlantic Freight Lines v. Pa. P.U.C., supra. Accordingly, the entry of a cease and desist order was proper in this case."

REASONS SUPPORTING THE GRANT OF THE WRIT

(a) Preliminary Statement

At the time the Superior Court of Pennsylvania handed down its opinion, your Honorable Court had not yet decided *Service Storage & Transfer Co., Inc. v. Commonwealth of Virginia*, supra. A petition in appeal was filed with the Supreme Court of Pennsyl-

vania, also prior to your Honorable Court's decision in the *Service Storage* case.

Immediately upon learning of the decision of the *Service Storage* case, Petitioner filed a supplement to its petition with the Supreme Court of Pennsylvania, attaching a copy of your Honorable Court's opinion and specifically inviting attention thereto.

Notwithstanding the filing of the supplemental petition, the Supreme Court of Pennsylvania refused allocatur in a per curiam Order (Appendix III). While it is recognized that refusal of allocatur or denial of certiorari imports no expression of opinion on the merits of the controversy, *Sunal* v. *Large*, 332 U. S. 174, 181; *House* v. *Mayo*, 324 U. S. 42, 48, it is nevertheless the fact that denial of allocatur in the instant matter deprives Petitioner of a remedy in the Pennsylvania courts, despite the decision of your Honorable Court in *Service Storage & Transfer Co., Inc.* v. *Commonwealth of Virginia*, supra.

(b) The Cases Relied Upon by the Superior Court of Pennsylvania Do Not Support Its Position

In the course of its opinion, the Superior Court of Pennsylvania relied substantially upon *Service Storage & Transfer Co., Inc.* v. *Commonwealth of Virginia*, 199 Va. 797 (1958), 102 S.E. 2d 339; *Eichholz* v. *Public Service Commission*, 306 U. S. 268, 59 S. Ct. 532, and its own decision in *Atlantic Freight Lines, Inc.* v. *Pennsylvania Public Utility Commission*, 163 Pa. Superior Ct. 215, 60 A. 2d 589.

Obviously the reliance upon the decision of the Virginia State Court of Appeals in the *Service Storage* case, which was reversed by your Honorable Court, was

in error. To the extent that the opinion of the Superior Court of Pennsylvania relies thereon, the opinion is in error and should not be allowed to stand.

Reliance on the *Eichholz* case, supra, also constitutes fundamental error for that case was predicated upon facts substantially different from those involved in the instant proceeding.

For example, in the *Eichholz* case the defendant, prior to 1935, received a permit from the Missouri Public Service Commission to operate as a motor carrier of property in interstate commerce. Part II of the Interstate Commerce Act, regulating motor carriers, was passed in 1935 and previous thereto the Federal Government had not subjected interstate motor carriers to regulation. Therefore, such operations properly could be regulated by State agencies.

After passage of Part II of the Interstate Commerce Act, Eichholz applied for a grandfather permit pursuant to Section 209(a)(1) of said Act. It was during the pendency of that application that the Missouri Commission had determined certain of Eichholz's operations to be intrastate in nature. Upon such determination, Eichholtz's Missouri interstate permit was duly withdrawn. On appeal, the action of the Missouri Commission was sustained by your Honorable Court. In the course of the opinion, the jurisdictional question was explained in the following language:

> "When the Commission revoked the permit, the Interstate Commerce Commission had not acted upon appellant's application under the Federal Motor Carrier Act and meanwhile the authority of the state body to take appropriate action under the state law to enforce reasonable reg-

ulations of traffic upon the state highways had not been superseded." (at page 273)

In the instant proceeding, Jones Motor Co., Inc. had interstate operating authority with specific authority from the Interstate Commerce Commission to combine the routes in question. Accordingly, the Interstate Commerce Commission had taken jurisdiction and no question of concurrent jurisdiction could arise.

The events subsequent to the decision of the Superior Court of Pennsylvania in *Atlantic Freight Lines, Inc.* v. *Pennsylvania Public Utility Commission*, supra, render that decision of little value. In the *Atlantic Freight Lines* case, as here, Pennsylvania Public Utility Commission instituted a complaint against the carrier averring that transportation between two Pennsylvania points, via an interstate certificated route, constituted intrastate commerce performed without a Pennsylvania certificate and hence was illegal. There, too, a cease and desist order issued from which Atlantic Freight Lines appealed to the Superior Court of Pennsylvania, which sustained the Commission. There, also, the Supreme Court of Pennsylvania refused allocatur and subsequently your Honorable Court denied certiorari.

Atlantic Freight Lines then filed a Petition for Declaratory Order with the Interstate Commerce Commission in order to ascertain whether the challenged operations were, in fact, authorized by its interstate certificates and constituted interstate commerce. The Interstate Commerce Commission, in *Atlantic Freight Lines, Inc.—Petition for Declaratory Order*, MC 77477, 51 M.C.C. 175, found for Atlantic Freight Lines and in the course of its Order stated:

". . . primary jurisdiction to determine the bona fides of interstate transportation is vested in this Commission" (at 186).

Certain similarities in the *Atlantic Freight Lines, Inc. Declaratory Order* case with the instant matter are considered pertinent:

a. There, as here, the carrier must either disobey the cease and desist order, with risk of arrest and prosecution, or cease operations and risk forfeiture of its interstate certificates under Section 212(a) of Part II of the Interstate Commerce Act (Respondent's Exhibit 1; MC 4963 and MC 4963, Sub 7).

b. There, as here, the interstate certificates authorize service from one Pennsylvania point to another Pennsylvania point by virtue of routes traversing another state.

c. There, as here, the certificates contained the following language preceding the outline of the authority granted:

"IT IS FURTHER ORDERED, That the transportation to be performed by said carrier in interstate or foreign commerce shall be as specified below:

d. In the *Atlantic Freight Lines, Inc. Declaratory Order*, case, supra, the Interstate Commerce Commission indicated that such language:

". . . serves as a factual finding that the operations authorized in the certificates are in interstate or foreign commerce and within our jurisdiction and that we have assumed jurisdiction over, and propose to regulate,

them in accordance with and in furtherance of the purposes of the Interstate Commerce Act." (51 M.C.C. 175, 187)

e. There, as here, the operating route was longer than the most direct route between the Pennsylvania points involved (Printed Record 230a-232a; Original Record 211-214; 51 M.C.C. 175, 179).

f. There, as here, the driving time over the interstate route was greater (Printed Record 230a-232a; Original Record 211-215; 51 M.C.C. 175, 179).

g. There, as here, the carrier charged the appropriate interstate rate (Respondent's Exhibit 5; 51 M.C.C. 175, 179).

h. In the *Atlantic Freight Lines, Inc. Declaratory Order* case the carrier sought a declaratory order to ascertain its right to operate in interstate commerce under its interstate certificates. In the instant proceeding the Interstate Commerce Commission prior to this proceeding authorized the combination of routes in its order at MC-F-4955, wherein the transfer to Petitioner of its authority at MC 4963, Sub 7 was approved (Respondent's Exhibit 3).

The Superior Court of Pennsylvania, though relying on its own decision in the *Atlantic Freight Lines* case, supra, failed completely to mention or to give any consideration to the *Atlantic Freight Lines Declaratory Order* case, supra.

In addition, Superior Court of Pennsylvania apparently did not realize that Pennsylvania Public Utility Commission and Atlantic Freight Lines, Inc. agreed

to a consent decree whereunder Atlantic Freight Lines, Inc. was permitted to operate between two Pennsylvania points via interstate routes of movement. A copy of said consent decree is attached hereto in its entirety as Appendix IV.

The denial of allocatur by the Supreme Court of Pennsylvania fails to give full weight to the decision of your Honorable Court in *Service Storage & Transfer Co., Inc.* v. *Commonwealth of Virginia*, supra, thereby leaving Petitioner without a remedy before the appellate courts of Pennsylvania for the redress of what Petitioner earnestly believes is an erroneous decision.

(c) The Superior Court of Pennsylvania Has Decided a Federal Question Contrary to an Applicable Decision of Your Honorable Court

The effect of the decision by Superior Court of Pennsylvania and the denial of allocatur by Supreme Court of Pennsylvania is contrary to the decision of your Honorable Court in *Service Storage & Transfer Co., Inc.* v. *Commonwealth of Virginia*, supra. In the *Service* case, your Honorable Court indicated that proceedings, such as the instant one, should be brought by the appropriate State agency before the Interstate Commerce Commission pursuant to Section 204(c) of Part II of the Interstate Commerce Act. Obviously this has not been done in the instant proceeding. In the course of the opinion in the *Service Storage* case,

the procedure to be followed was stated in clear and unmistakable terms:

> "It appears clear that interpretations of Federal certificates of this character should be made in the first instance by the authority issuing the certificate and upon whom the Congress has placed the responsibility of action." (Page 6)

Unless your Honorable Court assumes jurisdiction in the instant matter, Petitioner will continue to be faced by a cease and desist order, which it earnestly believes has been erroneously issued and erroneously sustained by the Superior Court of Pennsylvania. Petitioner has exhausted its remedies before the Pennsylvania appellate courts and now stands without prospect of relief unless certiorari is granted.

CONCLUSION

The commerce involved in this proceeding is interstate commerce within the definition thereof contained in Section 203(a)(10) of Part II of the Interstate Commerce Act, Title 49 U.S.C. 303(a)(10). The Superior Court of Pennsylvania has not given cognizance to that definition but has, in fact, modified that definition and, in so doing, has assumed jurisdiction of interstate commerce over which neither it nor Pennsylvania Public Utility Commission has jurisdiction.

Your Honorable Court should conclude that the action of Pennsylvania Public Utility Commission, as sustained by the Superior Court of Pennsylvania, is in contravention of the Interstate Commerce Act and

the "Commerce clause" of the Constitution of the United States and grant certiorari.

Respectfully submitted,

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APPENDIX I

SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT
HARRISBURG

April 29, 1959

Christian V. Graf, Esquire
11 North Front Street
Harrisburg, Penna.

Dear Mr. Graf:

JONES MOTOR CO., INC.

v.

PENNA. PUBLIC UTILITY COMMISSION

No. 123-A Miscellaneous Docket

Please be advised that the Court has entered the following order on petition for allocatur at No. 53 March Term, 1959:

"Per Curiam 4/27/59 Petition denied."

Very truly yours,

CHARLES H. McKIBBEN
Prothonotary

By /s/ MIRIAM A. GREENAWALT
Deputy Prothonotary

c. c.

William J. Wilcox, Esq., 624 Commonwealth Bldg., Allentown, Pa.

Thomas M. Kerrigan, Esq., 127 North Office Bldg., Harrisburg, Pa.

Paul F. Barnes, Esq., 811 Lewis Tower Bldg., Philadelphia 2, Pa.

APPENDIX II

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 53 March Term, 1959

JONES MOTOR COMPANY, INC., *Appellant*,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Appeal From the Order of the Pennsylvania Public Utility Commission at Complaint Docket No. 16813

Opinion by Hirt, J.

Filed: March 18, 1959

On August 5, 1957 Pennsylvania Public Utility Commission, of its own motion, filed a complaint against Jones Motor Company, Inc., charging it with violation of Art. II, § 202(b) and (c) of the Public Utility Law of May 28, 1937, P.L. 1053, as amended, 66 P S § 1122. The basis of the complaint was the transportation of commodities by motor truck as a common carrier between points in Pennsylvania without certification by the Commission. Highway Express Lines, Inc., and Modern Transfer Company, Inc., holders of certificates of public convenience issued to them by the Commission, were granted leave to intervene in the proceeding on their allegation that they were adversely affected by the unauthorized carrier activity of the respondent in Pennsylvania.

The complaint specifically charged 22 violations which included: eleven shipments originating in Philadelphia for delivery in Allentown, Bethlehem, Easton and Catasauqua, Pennsylvania; for shipments originating in Easton destined for Philadelphia and Hatboro, Pennsylvania; three shipments originating in Bethlehem for Philadelphia; one shipment originating in Oaks for Bethlehem; one shipment originating in Emmaus for Philadelphia; one ship-

ment originating in Catasauqua for Philadelphia; and one shipment originating in Chester for Bethlehem. That these shipments had been made, was admitted by the respondent; in justification however it asserted certificates of public convenience and necessity issued by the Interstate Commerce Commission, specifically set forth in its answer to the complaint.

The respondent, Jones Motor Company, Inc., holds a number of certificates issued by Pennsylvania Public Utility Commission authorizing it to transport property as a Class A common carrier between points within this State. But the extent of the common carrier rights is restricted for the most part to local transportation. They are enumerated in a finding of the Commission thus: " . . . it is authorized to transport property as a Class A carrier between Allentown and Easton and intermediate points via Bethlehem, Butztown and Dryland; and it holds rights as a Class A carrier between Bethlehem, Allentown and Stroudsburg and intermediate points over specified routes; between Borough of Bally, Berks County and Philadelphia and intermediate points, including Spring City, Trappe, King of Prussia, and Bridgeport; between Philadelphia and Reading; and between Reading and Bally."

Jones Motor Company, Inc., under Interstate Commerce Commission certificate MC 4963 had authority to transport commodities "From Philadelphia over U.S. Highway 1 to New York and return over the same route." Under the same certificate ancillary carrier service by this respondent was authorized: "to and from off route points . . . in that part of New Jersey within 35 miles of Princeton, New Jersey . . ." Both Trenton and Clinton, N. J. are within 35 miles of Princeton.

Prior to August 18, 1952 Clinton Motor Express had interstate commerce rights, as a common carrier over U.S. Highway Route 22 between Allentown, Pennsylvania,

via Clinton, to Elizabeth, New Jersey. On the above date Jones Motor Company, Inc., with the consent of the Interstate Commerce Commission, acquired by purchase all of the operating rights of Clinton Motor Express. After the sale was consummated, the Jones company, by I.C.C. certificate numbered MC 4963 Sub 7, was authorized to operate as a common carrier "Between Allentown, Pa., and Elizabeth, N. J. . . . over U.S. Highway 22 to junction New Jersey Highway 28" and thence to Elizabeth "and return over the same route". Under this certificate service was also authorized "to and from all intermediate points and off-route points . . . in Pennsylvania within 25 miles of Allentown".

The operation with which we are concerned in the shipments described in the complaint, consists in a combination of authorized service from Philadelphia under certificate MC 4963 to Clinton, N. J. joined by a "tacking" process upon that authorized by I.C.C. certificate MC 4963 Sub 7 which included service on U.S. Route 22 between Clinton and points within 25 miles from Allentown. Respondent admittedly in 1953 began the transportation of general commodities between the two areas of Philadelphia and Allentown under the above two I.C.C. certificates and has continued that service without authority from our Public Utility Commission. It is not without significance that the Jones company in 1950 had filed an application with our Public Utility Commission in an effort to consolidate its distinct and unconnected "northern" and "southern" class A. routes in Pennsylvania, above referred to, for which it held Pennsylvania P.U.C. certificates of public convenience. The order of the Commission granted on the application allowed an extension of routes from Allentown to Pottstown, a distance of 13 miles which in effect, by connecting the two certified local areas, gave respondent intrastate common carrier rights between the Philadelphia area and Allentown and to Stroudsburg on the north. On appeal to this court, however by a number of carriers which had

protested the application before the Commission, we reversed the order on the ground that inadequacy of existing service and the need for the additional service as proposed had not been proven. Modern Tr, Co. et al. v. Pa. P.U.C., 179 Pa. Superior Ct. 46 (1955), 115 A. 2d 887. An allocatur to the Pennsylvania Supreme Court was refused. Thus it not only appears that respondent does not have intrastate rights for transportation between the Philadelphia and Allentown areas but it is established with finality that it is not entitled to certification to that end.

Jurisdiction over interstate transportation by motor vehicles was conferred on the Interstate Commerce Commission by the Federal Motor Carrier Act of August 9, 1935, as amended, 49 U.S.C.A. § 301 et seq., which however in § 302(b) provides: "Nothing in this chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof." Thus the Congress has asserted a hands-off policy by expressly recognizing the power of each State to regulate commerce within its borders. Eicholz v. Public Service Commission, 306 U.S. 268, 59 S. Ct. 532 was a case in which the Commission had revoked Eicholz' carrier permit on a finding that he had unlawfully engaged in intrastate commerce under the pretense of transacting interstate business. On appeal the District Court from the evidence found that the carriage of property from Missouri into Kansas and thence back into Missouri for delivery there was not "the normal, regular, or usual route for shipping merchandise between the two cities in Missouri: and the court accordingly refused to issue a permanent injunction restraining the State Commission from prosecuting actions against Eicholz for using State Highways in the transporting of property for hire in interstate commerce. On appeal, the Supreme Court of the United States in affirming the

order said: "We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected." Cf. Nevin B. Lines, Inc. et al. v. Public Service Commission, 120 Pa. Superior Ct. 266, 272, 182 A. 80. Questions similar to those presented in the Eieholz case have been before this court, most recently in Atlantic Freight Lines v. Pa. P.U.C., 163 Pa. Superior Ct. 215, 60 A. 2d 589 where we said: "Regulation of interstate highways transportation is vested in the Interstate Commerce Commission by the Motor Carrier Act of August 9, 1935, 49 U.S.C.A. § 301, et seq., and by that Act of Congress controverted questions of fact were entrusted to the commission. United States v. Maher, 307 U.S. 148, 154, 59 S. Ct. 768. Under the definitions of the Act, 'interstate commerce' may include transportation of goods 'between places in the same State through another State . . .' 49 U.S.C.A. § 303(a), (10), (Central Greyhound Lines v. Mealey, 334 U.S. 653, 68 S. Ct. 1260), but with the limitation that 'Nothing in this chapter shall be construed to . . . authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.' 49 U.S.C.A. § 302(b)." The Atlantic Freight Lines case involved shipments of sugar from a refinery in Philadelphia over highways in the State of Maryland and thence back into this State for delivery to consignees in Braddock, Pennsylvania. The Commission, after hearing, entered a cease and desist order prohibiting a continuance of this method of transportation under the guise of Interstate Commerce Commission authority. We affirmed the order in the application of the principle that a mere fiction of interstate commerce may not be so availed of as

to deprive a State of its power to enforce sound regulation of the use of its highways in interstate commerce. From the order an allocatur to our Supreme Court was refused, and certiorari to the United States Supreme Court denied. Nevin B. Lines, Inc., et al. v. Public Service Commission, supra, and Ryan et al. v. Pa. P.U.C., 143 Pa. Superior Ct. 517, 17 A. 2d 637, have much in common with the above Atlantic Freight Lines case and on appeals were disposed of with similar results. Cf. Service Storage & Transfer Co. v. Commonwealth of Virginia, 199 Va. 797, (1958), 102 S.E. 2d 339.

The obvious intent of the Interstate Commerce Commission's certificate is to permit a carrier to engage in interstate commerce and regulation of such service is the extent of the Commission's jurisdiction. Moreover, interstate commerce, to be entitled to protection as such "must be real and bona fide": Blackmore et al. v. Public Service Commission, 120 Pa. Superior Ct. 437, 183 A. 115. Tacking of the authority in the present case, under certificate MC 4963 to that of certificate MC 4963 Sub 7 was entirely proper in establishing through routes in interstate commerce (Cf. 49 U.S.C.A. § 316(c)) but such tacking cannot supply a carrier with authority to transport property in intrastate commerce. Service Storage & Transfer Co. v. Commonwealth of Virginia, supra. The Commission found that the shipments here involved were not bona fide interstate and in its order said: "It is quite apparent that we cannot, in these circumstances, regard routing via New Jersey under mere color of interstate operating authority as anything other than a subterfuge to provide what is in fact intrastate service." That conclusion was inevitable especially after respondent had been denied a certificate by our Public Utility Commission authorizing transportation of property intrastate between Philadelphia and Allentown areas. The Interstate Commerce Commission did not at any time assume jurisdiction of carrier service, via New Jersey, between two points in Pennsylvania; the

usual regular and normal route between Philadelphia and the Allentown areas in Pennsylvania was U.S. Highway 309, a distance of 55 miles; the distance by way of the circuitous route through New Jersey was 100 miles, with driving time of 3½ hours as against 2¼ hours over the direct intrastate route; the shipments in question here were all made at night; there was no terminal at Clinton and no stops, pickups, or deliveries were made enroute in New Jersey; in the present order the Commission noted that no difference in freight rates was indicated, between those charged by respondent and the approved tariff rates applicable to certified intrastate carriers.

In this case the evidence was entirely sufficient to support the findings of the Commission that the Interstate Commerce Commission had not assumed jurisdiction of carrier transportation between two points in Pennsylvania, via New Jersey and that the movement by respondent across the State line was but a subterfuge to evade the State's requirements as to intrastate commerce. Atlantic Freight Lines v. Pa. P.U.C., supra. Accordingly, the entry of a ceas eand desist order was proper in this case.

Order affirmed.

APPENDIX III

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Complaint Docket No. 16813

PENNSYLVANIA PUBLIC UTILITY COMMISSION

v.

JONES MOTOR COMPANY, INC.

Order

BY THE COMMISSION, SEPTEMBER 2, 1958:

On August 5, 1957, we instituted the instant complaint on our own motion against Jones Motor Company, Inc., respondent herein for transportation not authorized by its certificates of public convenience, in violation of Article II, Sections 202(b) and 202(c) of the Public Utility Law, Act of May 28, 1937, P.L. 1053, as amended (66 P.S. 1122(b) and 1122(c)).

Jones Motor Company, Inc., respondent, filed an answer thereto, in which it admitted the transportation but set up as a defense its certificates of public convenience and necessity issued by the Interstate Commerce Commission (I.C.C.) at Docket Nos. MC 4963 and MC 4963, Sub No. 7 (Respondent's Exhibits "A" and "B" of its Answer).

Highway Express Lines, Inc. and Modern Transfer Company, Inc., holders of certificates of public convenience of this Commission, authorizing them to transport, as common carriers, property between certain designated points and areas within this Commonwealth, were granted leave to intervene on the ground that they are adversely affected by the alleged illegal activities of this respondent.

Thereafter, hearings were held on February 3, 1958 and on June 30, 1958. Jones Motor Company, Inc., respondent, filed its brief on August 14, 1958. The matter is now before us for disposition.

The instant complaint specifically charged Jones Motor Company, Inc., respondent, with 22 violations. The illegal shipments alleged included: (1) eleven shipments originating in Philadelphia destined for Allentown, Bethlehem, Easton and Catasauqua; (2) four shipments originating in Easton destined for Philadelphia and Hatboro; (3) three shipments originating in Bethlehem destined for Philadelphia; (4) one shipment originating in Oaks for Bethlehem; (5) one shipment originating in Emmaus for Philadelphia; (6) one shipment originating in Catasauqua for Philadelphia; and (7) one shipment originating in Chester for Bethlehem. These shipments have been admitted.

Jones Motor Company, Inc. is the holder of a number of certificates of public convenience issued by this Commission, authorizing transportation of property, as a common carrier, between points within this Commonwealth. For the purpose of this proceeding, it is authorized to transport property as a Class A carrier between Allentown and Easton and intermediate points via Bethlehem, Butztown, and Dryland; and it holds rights as a Class A carrier between Bethlehem, Allentown and Stroudsburg and intermediate points over specified routes; between Borough of Bally, Berks County and Philadelphia and intermediate points, including Spring City, Trappe, King of Prussia, and Bridgeport; between Philadelphia and Reading; and between Reading and Bally.

It is of significance that on May 17, 1950, Jones Motor Company, Inc., filed an application for amendment of its certificates at Application Docket No. 59731, Folder 8, Am-A, so as to permit the transportation of property over an extension of the above-described Class A routes as follows:

"To transport, as a common carrier, property over an extension of the above described routes between the City of Allentown, Lehigh County and the Borough of Pottstown, Montgomery County, including intermediate points, via the following routes:

"Beginning in the City of Allentown, thence via Highway Route 29 to its intersection with Highway Route 100 at the Village of Shimerville, Lehigh County, thence via Highway routes 29 and 100 to the Village of Hereford, Berks County, thence via Highway Route 100 to the Borough of Bally, Berks County, thence via an unnumbered road known as Hill Road to its intersection with Highway Route 663, thence via Highway Route 663 to the Borough of Pottstown, Montgomery County, and via an alternate route beginning at the Village of Hereford, Berks County, thence via Highway Route 29 to its intersection with Highway Route 663 at the Borough of Pennsburg, Montgomery County, thence via Highway Route 663 to its intersection with the aforesaid road known as Hill Road; with the right to render through service from points on the aforedescribed routes as authorized in the certificates, proposed extension and proposed alternate route to points on applicant's other certificated routes briefly described as follows, and vice versa, between the Borough of Bally, Berks County and the City of Philadelphia, via routes 100 and 422 and over an alternate route between the Borough of Pottstown and Philadelphia, via Highway routes 100, 83 and 23, connecting route between Boyertown and Limerick, via Swamp Pike Road, connecting route between Spring City and Trappe, via Highway Route 683, and spur route between King of Prussia and Bridgeport, via Highway Route 202; between the City of Philadelphia and the City of Reading, via Highway Route 422 and via an alternate route between Philadelphia and Reading,

via Highway routes 83 and 23 with connecting route between Highway routes 422 and 23, via Butler, Pike, Fayette Street and Matsonford Road; and between the City of Reading and the Borough of Bally, via Highway routes 562 and 100."

The order of the Commission, dated August 23, 1954, granted the application; and modified this carrier's certificated Class A routes in the Allentown, Bethlehem, Easton, Stroudsburg area by an extension of such routes from Allentown to Pottstown, a distance of 13 miles, with the further right to render through service between points on these Class A routes, by way of the extension, and points on Jones' other Class A routes in the Philadelphia, Pottstown, Reading area. However, on appeal, the order of the Commission was reversed: Modern Transfer Company v. Pa. P.U.C., 179 Pa. Superior Ct. 46, 48, 49 and 55, 115 A. (2) 887 (1955). In its opinion of July 21, 1955, the Superior Court stated:

"Originally, Jones had class A rights to haul between the Borough of Bally, Berks County, and Philadelphia and intermediate points, including Spring City, Trappe, King of Prussia, and Bridgeport; between Philadelphia and Reading; and between Reading and Bally. These routes are designated as its 'southern' routes. In 1949, the Commission denied Jones' application, at Application Docket No. 59731, folder 2, Am-B, to transport property as a class D carrier from points in the Borough of Spring City and within 10 miles to points within 35 miles. In 1950, Jones acquired additional class A routes designated as its 'northern' routes, by purchasing the operating authority of Allentown-Easton Motor Express, Inc., and of Allentown-Bangor Motor Transfer, Inc. The latter was certificated to conduct a route service between Allentown, Bethlehem, Stroudsburg, and other points to the north of Allentown in the Pocono area;

while Allentown-Easton Motor Express, Inc., was certificated to conduct a route service between Allentown, Easton, and intermediate points by way of Bethlehem, Butztown, and Dryland.

"It is obvious that the purpose of the present application was not merely to obtain an extension of class A rights from Allentown to Pottstown, but to effect a consolidation of Jones' prior distinct and unconnected 'northern' and 'southern' class A routes. The Commission's order, in effect, provides for such a consolidation, and also has the effect of granting applicant a very substantial portion of those rights denied it in 1949. As a result Jones could haul from Philadelphia by using the newly certificated connecting route, as far north as Mountain Home in the Poconos. In addition Jones may haul between such vital areas as the Allentown, Bethlehem, Easton, Stroudsburg territory and Philadelphia, Reading, or Pottstown."

It concluded:

"* * * The burden was upon the applicant to show the need for the extensive rights sought on the combined routes including the 13-mile connecting route between Allentown and Pottstown. This was not met by equivocal or inconclusive testimony which, if it shows anything, substantiates the adequacy of existing service between the principal points on the combined routes. * * *"

Therefore, it seems plain that this carrier was specifically denied intrastate operating authority to transport property between Philadelphia, Allentown, Bethlehem, and Easton and intermediate points because of the adequacy of existing service.

Jones Motor Company, Inc., in attempting to establish the interstate character of the transportation in question

relied upon its certificates of public convenience and necessity issued by the Interstate Commerce Commission. At MC 4963 Jones is authorized to perform the following transportation, inter alia:

> "It Is Further Ordered, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:
>
> Regular Routes:
>
> * * * * * * *
>
> "*General commodities,* except those of unusual value, and except dangerous explosives, livestock, films, household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M.C.C. 467, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading,
>
> * * * * * * *
>
> "Between Philadelphia, Pa., and New York, N. Y.:
>
> From Philadelphia over U.S. Highway 1 to New York, and return over the same route.
>
> Service is authorized to and from all intermediate points.
>
> * * * * * * *
>
> "Service is authorized to and from off-route points in that part of Pennsylvania within 20 miles of Spring City, Pa., those in that part of New Jersey within 35 miles of Jersey City, N. J., those in that part of New Jersey within 35 miles of Princeton, N. J., and all other off-route points in the New York, N. Y., Commercial Zone, as defined by the Commission in 1 M.C.C. 665."

At MC 4963, Sub. No. 7 Jones is authorized to perform the following transportation:

"It Is Further Ordered, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

Regular Routes:

"*General commodities,* except those of unusual value, livestock, Class A and B explosives, household goods as defined by the Commission, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading.

"Between Allentown, Pa., and Elizabeth, N. J.:

From Allentown over U. S. Highway 22 to junction New Jersey Highway 28 near Raritan, N. J., and thence over New Jersey Highway 28 to Elizabeth, and return over the same route.

"Service is authorized to and from all intermediate points and the off-route points of Lancaster, Pa., Dover, Newark, Hackettstown, Washington, Belvidere, and Newton, N. J., and points in Pennsylvania within 25 miles of Allentown."

Therefore, in effect, the rights authorized by the Interstate Commerce Commission permit Jones Motor Company, Inc. to go from Philadelphia to New York, to points within a 35 miles radius of Princeton, and from Allentown, Pennsylvania, to Elizabeth, New Jersey. It is by virtue of these rights and decisions of the Interstate Commerce Commission permitting "tacking" that Jones contended that it is able to combine its rights so as to set up a route from Allentown, Pennsylvania, thence to Clinton, New Jersey, thence to Trenton, New Jersey, and thence to Philadelphia, and vice versa. The routes traversed for each of the 22 shipments involved in this complaint proceeded from Philadelphia to Trenton, New Jersey, via U. S. Highway Route 1; thence via U. S. Route 60 to Clinton, New Jersey; thence via U. S. Highway Route 22 to Allentown,

and vice versa. Such operations in fact have been conducted on a daily basis since 1952.

Of course, regulation of interstate highway transportation is vested in the Interstate Commerce Commission by the Federal Motor Carrier Act of 1935, 49 U.S.C.A., Section 301, et seq. However, such regulation does not authorize a motor carrier to do an intrastate business on the highways of any state or otherwise interfere with the exclusive exercise of a state's power to regulate intrastate commerce: 49 U.S.C.A., Section 302(b); Ryan, et al. v. Pa. P.U.C., 143 Pa. Superior Ct. 517, 17 A. 2d 637, 39 PUR (NS) 455 (1950), allocatur to the Supreme Court refused and certiorari to the United States Supreme Court denied 314 U. S. 640, 62 S. Ct. 80, 86 L. Ed. 514 (1941); Atlantic Freight Lines v. Pa. P.U.C., 163 Pa. Superior Ct. 215, 60 A. 2d 589 (1948), allocatur to Supreme Court refused, certiorari denied to the United States Supreme Court 336 U. S. 925, 69 S. Ct. 656, 93 L. Ed. 1087 (1949); Clark v. The Public Service Commission, 209 Md. 121, 120 A. 2d 363 (1956); Eichholz v. The Public Service Commission of the State of Missouri, 306 U. S. 268, 59 S. Ct. 532, 83 L. Ed. 641, 27 PUR (NS) 288, rehearing denied 306 U. S. 622, 669, 83 L. Ed. 1063 (1939); and Central Greyhound Lines v. Mealey, 334 U. S. 653, at 660, 68 S. Ct. 1260, 92 L. Ed. 1633 (1947).

In our opinion, Jones Motor Company, Inc. has not established that these shipments between two points in Pennsylvania via New Jersey constituted bona fide shipments in interstate commerce. (1) The Interstate Commerce Commission has not assumed jurisdiction of transportation between two points in Pennsylvania. What the Interstate Commerce Commission authorized was transportation (a) from Philadelphia to New York, to points within a 35 mile radius of Princeton and (b) from Allentown, Pennsylvania, to Elizabeth, New Jersey, and not transportation from Philadelphia to Allentown, Bethle-

hem, Easton, and intermediate points, and vice versa—points of origin and delivery within Pennsylvania. (2) All of the shipments in the complaint were hauled from the Allentown terminal of Jones Motor Company, Inc., to its Philadelphia terminal or vice versa. No stops, pickups, or deliveries were made in New Jersey. (3) The distance via New Jersey measured approximately 100 miles as compared to 55 miles by the usually traveled or most direct intrastate route, and the average driving time via New Jersey consumed approximately three hours and thirty minutes as compared to two hours and fifteen minutes by the direct intrastate route. (4) No difference in rates was indicated between those charged by Jones Motor Company, Inc. and those charged by the certificated intrastate carriers. (5) No legitimate reason was advanced for routing the shipments via New Jersey.

It is quite apparent that we cannot, in these circumstances, regard routing via New Jersey under mere color of interstate operating authority as anything other than a subterfuge to provide what is in fact an intrastate service.

Jones Motor Company, Inc. actually holds itself out to provide transportation between points beginning and ending in this Commonwealth. By mere routing via New Jersey it has been doing indirectly what it could not do directly. If this Commission is unable to control such activities, it cannot effectively regulate transportation service within this Commonwealth, pursuant to the provisions of the Pennsylvania Public Utility Law, Act of May 28, 1937, P. L. 1053, as amended (66 P.S. Section 1101, et seq.). Regulation under the Act in the transportation field is there declared to be the public interest.

> "Section 801 (66 P.S § 1301). Declaration of Policy.—It is hereby declared to be the policy of the Legislature to regulate in this act the service of common carriers by motor vehicle and forwarders in such manner as to recognize and preserve the inherent

advantages of, and foster sound economic conditions in such service, and among such carriers and forwarders in the public interest; to promote safe, adequate, economical, and efficient service by common carriers by motor vehicle and forwarders, and just and reasonable rates therefor, without unjust discrimination, and unfair or destructive practices; to improve the relations between and coordinate the service and regulation of common carriers by motor vehicle, forwarders, and other carriers; to develop and preserve a safe highway transportation system properly adapted to the needs of the commerce of the Commonwealth of Pennsylvania and insure its availability between all points of production and markets of this Commonwealth. * * * "

Included in the Act as a duty of this Commission is that it " * * * enforce, execute, and carry out, by its regulations, orders, or otherwise, all and singular the provisions of this Act, and the full intent thereof: * * * " Section 902.

The Supreme Court of Appeals of Virginia recently affirmed a holding of the Virginia Commission that a carrier serving two points within a state does not escape state regulation by following a circuitous route into another state and back again for the purpose of evading such regulation; and that state regulation depends upon whether the movement is bona fide, of which the test is whether an ordinarily prudent carrier not restrained by regulation would use the interstate route: Virginia v. Service Storage & Transfer Co., 14 PUR (3d) 218 (1956); affirmed sub nom. Service Storage & Transfer Company, Inc. v. Commonwealth of Virginia, 199 Va. 797, 102 S. E. (2) 339 (1958). Applying this test to the instant case, wherein the evidence clearly shows that the "normal or usual" routes were not followed between the Pennsylvania points, there is no doubt in our minds that the shipments

in question are amenable to the jurisdiction of this Commission.

In our consideration of the facts and the law in this case, we find and determine that Jones Motor Company, Inc., respondent, has been engaged in the transportation of property between points in Pennsylvania without first having obtained the approval of this Commission; further that the transportation between points of origin and destination within the Commonwealth of Pennsylvania via New Jersey routes is a subterfuge to evade the Pennsylvania law and the jurisdiction of this Commission; THEREFORE,

IT IS ORDERED: That the instant complaint be and is hereby sustained.

IT IS FURTHER ORDERED: That Jones Motor Company, Inc., its agents and employees, forthwith cease and desist rendition of service as a motor carrier in intrastate commerce except as specifically authorized by certificates of public convenience issued by this Commission.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

(signed) LEON SCHWARTZ
Chairman

ATTEST:

/s/ WILLIAM P. ROAN
Secretary

(SEAL)

Commissioner Houck voted in the negative.

APPENDIX IV

C. P. Dauphin County

Equity Docket No. 2008

C. D. No. 267

PENNSYLVANIA PUBLIC UTILITY COMMISSION

v.

ATLANTIC FREIGHT LINES, INC.

STIPULATION

AND NOW, this 27th day of July, A. D., 1955, it is hereby stipulated and agreed by and between the parties to the above styled cause that the Court shall and may enter the following decree.

(s) HARRIS LATTA

(s) JOSEPH HISSLEY

Attorneys for Atlantic Freight Lines

C. P. Dauphin County

Equity Docket No. 2008

C. D. No. 267

PENNSYLVANIA PUBLIC UTILITY COMMISSION

v.

ATLANTIC FREIGHT LINES, INC.

DECREE

AND NOW, this 27th day of July, 1955, upon the consent of the parties to the above styled cause, and upon consideration of the pleadings filed and proceedings heretofore had therein, the plaintiff having exhibited its complaint, as

amended, asking relief touching the matters therein particular complained of and set forth at length, and preliminary objections to the complaint having been determined, and answer having been filed by defendant, and the parties, including intervenors, having agreed that the matter shall be disposed of by the entry of a consent decree.

Now Therefore, It Is Ordered, Adjudged, Decreed And Finally Determined that defendant, Atlantic Freight Lines, Inc., be, and hereby is, enjoined from transporting freight, as a common carrier by motor vehicle, or otherwise, between points in Pennsylvania, except such transportation in interstate commerce as may be authorized by operating authority from the Interstate Commerce Commission and which in fact moves over an interstate route of movement; it being the intent of this decree to prohibit absolutely any transportation of freight by defendant between points in Pennsylvania in intrastate commerce over a route of movement lying wholly within the Commonwealth of Pennsylvania, but to impose no restriction whatsoever upon defendant with repsect to transportation in interstate commerce between points in Pennsylvania which defendant is authorized to serve by operating authority from the Interstate Commerce Commission and which transportation in fact moves over a route of movement so authorized by the Interstate Commerce Commission and lying partly within and partly without the Commonwealth of Pennsylvania.

(s) Walter R. Sohn
J.

We consent to the entry of the foregoing decree.

(s) Harris Latta

(s) Joseph Nissley
Attorneys for Atlantic Freight Lines

FILE COPY

No. 120

Court, U.S.
ED
Clerk

In The

Supreme Court of the United States

No. 1005 October Term, 1957

JONES MOTOR CO., INC.,
Petitioner

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondent

and

HIGHWAY EXPRESS LINES, INC.,
MODERN TRANSFER COMPANY, INC.,
Intervening Respondents

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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QUESTION PRESENTED

Where a trucking company is actively operating between two points in Pennsylvania, by way of New Jersey, without any justification and solely as a subterfuge, and where specific authorization for same has not been obtained from the Interstate Commerce Commission, may the State Public Utility Commission order such carrier to cease and desist until a certificate of public convenience is secured from it?

Answered by the Pennsylvania Superior Court in the affirmative.

COUNTER-STATEMENT OF THE CASE

Petitioner in its Statement of the Case makes the following misstatement: "In addition, interstate interline traffic to and from other carriers and traffic destined to points on the specified routes, not situated in Pennsylvania, likewise is handled."

The facts in this instance involve 22 shipments from or to the Allentown area and Philadelphia area. Petitioner candidly admitted that all the shipments in this case moved in trucks which carried no state-to-state transportation and that no stops, deliveries or pick-ups were made in New Jersey (R. 161a, 217a-218a).

These are the findings made by the Pennsylvania Public Utility Commission and the Pennsylvania Superior Court on the basis of the Petitioner's admission. What Petitioner might do in other instances not involved in the present case is not before your Honorable Court. The Pennsylvania Public Utility Commission therefore takes objection to Petitioner's statement concerning "interstate interline traffic."

ARGUMENT

THE PENNSYLVANIA SUPERIOR COURT PROPERLY FOUND THAT PETITIONER WAS OPERATING BETWEEN POINTS IN PENNSYLVANIA SOLELY AS A SUBTERFUGE WITHOUT SPECIFIC AUTHORIZATION FROM THE INTERSTATE COMMERCE COMMISSION. THE PETITION FOR A WRIT OF CERTIORARI SHOULD THEREFORE BE DENIED

I. The Commonwealth of Pennsylvania Is Not Precluded From Exercising Jurisdiction in the Absence of Specific Action by the Interstate Commerce Commission

The decision of the Pennsylvania Superior Court requiring Jones Motor Co., Inc., Petitioner, to obtain a certificate of public convenience from the Pennsylvania Public Utility Commission was supported by substantial evidence and did not conflict with any certificate issued by the Interstate Commerce Commission (I.C.C.). Petitioner does not assail the sufficiency of the evidence but argues that the Commonwealth of Pennsylvania is precluded from acting under its accepted and recognized powers because of the certificate of public convenience and necessity issued to the Petitioner by the Interstate Commerce Commission.

The accommodation of the federal and state authorities in their respective spheres of government has constantly been a delicate determination of power,

based upon the necessities of the given situation and the respective interests of each sovereignty. As applied to this case the rule may be stated that in the absence of a direct conflict with the federal authority, the state is free to regulate under its traditional and accepted reserved powers secured to it by the Constitution.

The basis of state action in the instant case was that the Pennsylvania Public Utility Commission found that the petitioner has been circuitously routing its transportation through New Jersey to avoid the certificate requirements of the Pennsylvania Public Utility Law.[1]

As will hereinafter be adverted to, the evidence contained in the record clearly demonstrated that Petitioner's operations were intended as a subterfuge. Since the Pennsylvania Commission's order did not conflict with federal authority, it is clear under the decision in *Eichholz v. P.S.C.*, 306 U.S. 268, 622, 59 S. Ct. 532, 83 L. Ed. 641 (1938), that the state action involved in the instant case was unquestionably within the jurisdiction of the state agency.

The basic question, as heretofore stated, is whether Petitioner's I.C.C. certificate completely ousts the jurisdiction of the Commonwealth of Pennsylvania. We agree that the Interstate Commerce Commission is supreme when it acts, and that any state action in conflict with the expressed action of that body would

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[1] Section 202(c) of the Act of May 28, 1937, P.L. 1053, 66 P.S. §1122(c). See Statutes Involved set forth on page 5 of Petition, for text. A public utility is defined by Section 2 (17)(c), 66 P.S. §1102(17)(c), as any person or corporation "transporting passengers or property as a common carrier."

be invalid: In the instant case, four Commissioners of the Pennsylvania Public Utility Commission, the seven judges of the Superior Court of the Commonwealth of Pennsylvania, and apparently, the seven Judges of the Supreme Court of the Commonwealth of Pennsylvania, who have all passed upon this matter, have unanimously concluded that the action taken by the Interstate Commerce Commission, as set forth in the Petitioner's I.C.C. certificates, does not expressly nor by necessary inference oust the traditional jurisdiction of this State in the type of regulation sought to be imposed upon the Petitioner.

A. The limits of Petitioner's I.C.C. certificates.

The Pennsylvania Public Utility Commission found that the Petitioner was actively engaged in trucking operations between the Philadelphia area and the Allentown area, points which are wholly within the Commonwealth of Pennsylvania. It is **conceded** that the I.C.C. certificates possessed by Petitioner do not *expressly* authorize transportation between these two areas in Pennsylvania. If such specific authorization existed, the jurisdiction of the Commonwealth of Pennsylvania over Petitioner's operations would be foreclosed and precluded. Petitioner's rights from the Interstate Commerce Commission, however, authorize no such transportation.

The Pennsylvania Superior Court accurately stated Petitioner's authority in its opinion. Petitioner holds two separate certificates. One, MC-4963, acquired on March 8, 1943, authorizes Petitioner to transport commodities "from Philadelphia over U. S. Highway 1 to New York and return over the same route," with

ancillary carrier service "to and from off route points . . . in that part of New Jersey within 35 miles of Princeton . . ." The second certificate, MC-4963, Sub 7, acquired March 4, 1953, authorizes Petitioner to operate "between Allentown, Pa., and Elizabeth, N. J. over U. S. Highway 22 to junction New Jersey Highway 28" and return over the same route. Under this certificate, service was authorized "to and from all intermediate points and off route points . . . in Pennsylvania within 25 miles of Allentown."

The Commonwealth of Pennsylvania, through its administrative and judicial tribunals, has scrutinized the foregoing certificates and has failed to find any specific authorization for the type of transportation which Petitioner was conducting within the confines of the Commonwealth of Pennsylvania in this case. These two I.C.C. certificates are clear and proper. One authorizes transportation from Philadelphia to New York and the other authorizes transportation from a point in Pennsylvania (Allentown) to a point in New Jersey (Elizabeth). From these two certificates Petitioner has attempted to justify a very aggressive trucking operation between the Allentown and Philadelphia areas, non-stop and uninterrupted.

B. The Commonwealth of Pennsylvania can read Petitioner's I.C.C. certificates to determine if there is specific authorization.

The Commonwealth of Pennsylvania has a right to read Petitioner's certificate to determine whether there has been an ouster of its jurisdiction clearly expressed by the Interstate Commerce Commission. Certainly a carrier cannot preclude a state from in-

quiring into a subterfuge of its jurisdiction merely because it raises a specious and untenable claim under its I.C.C. certificates.

The state is often called upon to read and determine the effects of federal action upon its own jurisdiction. The state must look to the federal action, be it in the form of a federal statute, regulation, order of the executive, or administrative tribunal, to ascertain whether the state's traditional scope of jurisdiction has been superseded or pre-empted. For example, the Supreme Court of Pennsylvania in *Commonwealth v. Nelson*, 350 U.S. 497, 76 S. Ct. 477, 100 L. Ed. 640 (1956), properly concluded after comparing the Smith Act of Congress with Pennsylvania's own Anti-Sedition Act that federal action had superseded Pennsylvania's right to act in the area and struck down its own state statute. On the other hand, the high court of California in comparing the federal act with its own, erroneously struck down its own statute making it a state crime for an agent or broker to sell tickets for interstate transportation without a license from the Interstate Commerce Commission. *California v. Zook*, 336 U.S. 725, 69 S. Ct. 841, 93 L. Ed. 1005 (1948). This procedure of comparison occurs many, many times in matters involving safety appliances, boilers, securities, labor relations, highway regulations, etc. In the instant case the State tribunals looked upon Petitioner's I.C.C. certificates and concluded that there was no ouster.

C. Federal action to supersede state power of regulation must be clearly expressed.

Where a matter ordinarily would be within the competence of the state in assuming jurisdiction, it has

often been enunciated by your Honorable Court that for state authority to be superseded, the federal assumption must clearly appear and nothing must be left to inference or presumption.[2] Any doubt that may exist as to supersession of state jurisdiction must be resolved in favor of state authority. *Corp. Commission of Oklahoma v. Lowe*, 281 U.S. 431, 438, 50 S. Ct. 397, 74 L. Ed. 945 (1930); *Arkansas R.R. Commission v. Chicago, Rock Island & Pac. R.R. Co.*, 274 U.S. 597, 603, 47 S. Ct. 724, 71 L. Ed. 1224 (1927).

It may further be stated in conformity with these fundamental propositions that if the expression of federal assumption is not clear or precise, then the federal government cannot thereby claim any supersession, and the state therefore would have the right to continue to exercise its normal jurisdiction. Under the delicate balance of power between the federal and state governments, the burden is upon the federal authority to clearly and unmistakably manifest its intention.

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[2] *Alabama Public Service Commission v. Southern Ry.*, 341 U.S. 346, 71 S. Ct. 762, 95 L. Ed. 1002 (1950); *California v. Zook*, 336 U.S. 725, 733, 736, 737, 69 S. Ct. 841, 93 L. Ed. 1005 (1948); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947); *North Carolina v. U. S.*, 325 U.S. 507, 511, 65 S. Ct. 1260, 89 L. Ed. 1760 (1945); *Yonkers v. U. S.*, 320 U.S. 685, 690, 691, 64 S. Ct. 327, 88 L. Ed. 400 (1944); *Palmer v. Massachusetts*, 308 U.S. 79, 83-85, 60 S. Ct. 34, 84 L. Ed. 93 (1939); *Townsend v. Yeomans*, 301 U.S. 441, 454, 57 S. Ct. 842, 81 L. Ed. 1210 (1936); *Atchison Ry. v. R.R. Commission*, 283 U.S. 380, 393, 51 S. Ct. 553, 75 L. Ed. 1128 (1930).

II. Since There Is No Clear and Definite Manifestation by the Interstate Commerce Commission, the Instant Case Is Distinguishable From Service Storage and Transfer Company v. Commonwealth of Virginia

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In the instant case there is no such clear expression. For that reason the Commonwealth of Pennsylvania has pursued its traditional authority. On this point alone the case is clearly distinguishable from *Service Storage and Transfer Company v. Commonwealth of Virginia,* recently decided by your Honorable Court on March 30, 1959, and reported in 359 U.S. 171, 79 S. Ct. 714.

The facts in that case, which will be referred to in more detail subsequently, involved an I.C.C. carrier which had been fined by the Commonwealth of Virginia for carrying merchandise between points in Virginia through Bluefield, West Virginia, without a certificate of public convenience and necessity from the State Corporation Commission. The carrier there routed the transportation through Bluefield, West Virginia, because it maintained its main terminal there and used that terminal as a redistribution center for its entire transportation system. After reviewing the carrier's transportation system, your Honorable Court described the carrier's operations through Bluefield, West Virginia, as "practical, efficient, and profitable." However, in that case, aside from the fact that there was no evidence of "subterfuge," the carrier's certificate from the I.C.C. *expressly* covered the operations under question.

The I.C.C. certificate was quoted by your Honorable Court in its opinion, and it read in part:

> "Between Bluefield, Va., and *points and places within five miles of Bluefield, Va.* and those within five miles of Bluefield, W. Va., respectively, on the one hand, and, on the other, *points and places in that part of Virginia* and West Virginia *within 75 miles* of that territory." (Italics added.)

Your Honorable Court stated in its opinion "The certificate on its face covers the whole operation." There was no question but that the certificate by express language covered the operations under attack by the Commonwealth of Virginia. To further show express authorization from the Interstate Commerce Commission, your Honorable Court referred to a prior unpublished report of the Interstate Commerce Commission issued in 1953 in which the "I.C.C. expressly approved the very type of operation now being carried on." The report of the I.C.C. also showed that the I.C.C. had expressly authorized the carrier to utilize Bluefield, West Virginia as a "gateway". (See *Service Storage and Transfer Company, Inc.*, 59 M.C.C. 803.) Your Honorable Court also referred to an opinion issued by the I.C.C. and reported in 71 M.C.C. 304, in which the Commission upon petition by the carrier for a declaratory order expressly "construed petitioner's certificate as authorizing Virginia-to-Virginia traffic routed through Bluefield, West Virginia."

Ignoring the express language in the carrier's I.C.C. certificate, the unpublished report of the I.C.C. as heretofore related, and the published opinion of the I.C.C. in 71 M.C.C. 304, the Commonwealth of Virginia

proceeded to redetermine the good faith of the carrier's operations. In the instant case there has been no such ouster. The language of Petitioner's certificates does not afford authority or justification for the point-to-point transportation engaged in by Petitioner. There has been no report or opinion by the I.C.C. holding that Petitioner may engage in the operations in question without regard to Pennsylvania law. There has not been any plain and unequivocal expression of authorization from the I.C.C. in this case as there was in the Service Storage case.

Petitioner, of course, is bound by the clear and plain language of its certificate. Petitioner cannot attempt to enlarge its scope of authority by reference to reports or matters outside the terms of its certificate. The certificate is the final judgment in the matter and in the absence of ambiguity or clerical errors represents the complete scope of authorization. See, *eg.*, *Bingler Vacation Tours v. U. S.*, 132 F. Supp. 793, 796 (D. N.J. 1955), affirmed, 350 U.S. 921, 76 S. Ct. 211, 100 L. Ed. 806 (1955);[3] *U. S. v. Rock Island Motor Transit Co.*, 340 U.S. 419, 447, 71 S. Ct. 382, 95 L. Ed. 391 (1952); rehearing denied, 341 U.S. 906, 71 S. Ct. 609, 951 L. Ed. 1344; *U. S. v. Seatrain Lines, Inc.*, 329 U.S. 424, 432, 67 S. Ct. 435, 91 L. Ed. 396 (1947); *Smith Bros. Revocation*, 33 M.C.C. 465, 472 (1942).

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[3] In the Bingler Vacation Tours case, headnote No. 2 reads: "Where bus company's certificate is not ambiguous, authorization afforded by certificate could be determined only by construing language of certificate itself and operations upon which certificate had been granted could not be considered."

A. Petitioner's claim that the report of the I.C.C. at MC-F-4955 (preceding the certificate at MC-4963, Sub. No. 7) authorizes its operations is entirely fallacious.

Although Petitioner would have no right to rely upon an antecedent report of the I.C.C. in this case, because Petitioner adverts to it for support, we shall point out wherein Petitioner's reliance thereon is misplaced. The report was rendered in an application proceeding docketed MC-F-4955 involving a transfer of rights from Clinton Motor Express to Petitioner. The final certificate issued therein is now known as MC-4963, Sub. No. 7. The rights possessed by Clinton Motor Express were known under the docket number of MC-108161. The I.C.C. noted in that report that the rights to be transferred covered regular routes and irregular routes between the Allentown area and the New York Commercial Zone. While the vendor (Clinton Motor Express) could not combine its routes, the I.C.C. decided that Petitioner should have that right and in Petitioner's certificate (MC-4963, Sub. No. 7) that right is given with duplications eliminated. On Sheet 4 of the report the I.C.C. concluded that the combination of such routes should be allowed, and stated:

> "Under the unified rights, vendee (Petitioner) would have authority to transport general commodities over regular routes and, in truckload lots, over irregular routes between Allentown and points in Pennsylvania within 25 miles thereof, on the one hand, and, on the other, points in the New York commercial zone. It appears unlikely that any real distinction could be maintained by vendee

in its regular- and irregular-route operations between those points."

The I.C.C. also said in its report in concluding to allow the combination as aforesaid:

> "Upon consummation of the purchase, Jones Motor Co., Inc., will be entitled to operate under the operating rights granted in *No. MC-108161,* which rights are herein authorized to be unified with rights otherwise confirmed in *it* and to be embraced in a certificate in its name, with duplications eliminated." (Italics added.)

It is, of course, clear from this that the unification allowed by the I.C.C. was that pertaining to the rights at No. MC-108161 (Clinton's certificate), namely, the regular and irregular routes. There was no expression by which it can be inferred that the I.C.C. authorized Petitioner to combine its rights contained in No. MC-108161 with its prior rights at MC-4963.

B. Petitioner has an adequate remedy of which it has not availed itself.

In the Service Storage and Transfer case, the carrier had applied to the I.C.C. for a specific ruling on the propriety of its operations. The Commonwealth of Virgina did not even enter an appearance before the I.C.C. to present its view. The I.C.C. reaffirmed its prior opinions in that case and specifically authorized and approved the carrier's operations. See 71 M.C.C. 304.

In the instant case Petitioner has obtained no such decision from the I.C.C. and has not made an attempt

to obtain such a ruling. If Petitioner is really certain of its position, it would have been an easy matter for it to have obtained a clear and unambiguous decision from the Interstate Commerce Commission as Service Storage and Transfer Company, Inc. did in the Service Storage case.

The law is clear that "no one is entitled to judicial relief until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Corp.*, 303 U. S. 41, 50, 51, 58 S. Ct. 459, 463, 82 L. Ed. 638 (1937); *Pittsburgh & W. Va. Ry. Co. v. I.C.C.*, 280 F. 1014 (App. D.C. 1922).

If an administrative proceeding might leave no remnant of the constitutional question, the administrative remedy should be pursued.

Allen v. Grand Central Aircraft Co., 347 U.S. 535, 553, 74 S. Ct. 745, 98 L. Ed. 933 (1954);

Aircraft & Diesel Equipment Corp. v. Hersch, 331 U.S. 752, 767-773, 67 S. Ct. 1493, 91 L. Ed. 1796 (1947);

Macauley v. Waterman S. S. Corp., 327 U.S. 540, 543, 544, 66 S. Ct. 712, 90 L. Ed. 839 (1946).

Since Petitioner has an adequate remedy which it has not availed itself of, the respondent herein respectfully requests your Honorable Court to deny the Petition for the Writ of Certiorari in this case. The matter is not ripe at this stage. Should Petitioner be successful in obtaining a specific I.C.C. ruling in its favor and if, further, the Comonwealth of Pennsylvania fails to recognize such authorization, then there will be time

enough for Petitioner to assert a claim for relief in the courts. However, until then, state jurisdiction may not be ceded away or overridden by speculation of ambiguous reasoning.

C. Section 204(c), 49 U.S.C. §304(c) does not bar the exercise of state jurisdiction in this case.

Your Honorable Court has indicated that a state may apply to the Interstate Commerce Commission under Section 204(c) of the Interstate Commerce Act, 49 U.S.C. §304(c) for relief. This section is certainly an avenue open to the states. However, jurisdiction is a question of power, and a power which a state has cannot be taken away unless its jurisdiction has been superseded by express language by the federal government. To hold that a state has no right to assert its own jurisdiction merely because there is another avenue of appeal would be the promulgation of a new and dangerous doctrine and one that would be at odds with the long line of firm and well-established decisions of your Honorable Court. This would be tantamount to precluding state jurisdiction by inference or presumption. Certainly, it was never intended by the Congress that Section 204(c) was to have that effect.

There is, of course, nothing in the language of your Honorable Court's opinion in the Service Storage case that would suggest such a result.

D. The Interstate Commerce Act requires specific authorization.

The Interstate Commerce Act provides that the I.C.C. certificate of public convenience and necessity

specify the fixed termini between which the carrier is authorized to operate. In Section 207, 49 U.S.C. §307, it is written:

> ". . . no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over *other than a regular route or routes, and between fixed termini*, except as such carriers may be authorized to engage in special or charter operations.".

Section 208, 49 U.S.C. §308, further provides:

> "Any certificate issued under section 306 or 307 of this title *shall specify* the service to be rendered and the routes over which, *the fixed termini*, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate."

The I.C.C. has expressed itself in Petitioner's certificates in clear language. It has specified transportation between Philadelphia and New York in one certificate and between Allentown, Pa., and Elizabeth, N. J., in another. Not a word is mentioned about transportation between Philadelphia and Allentown. It would certainly have been simple enough in pursuance of the sections quoted above in the Interstate Commerce Act for the Commission to have stated that Petitioner is authorized to serve between the fixed termini of Philadelphia and Allentown. No such language was used nor can any such intention be inferred or gleaned from the wording of Petitioner's I.C.C. certificates.

III. Petitioner Cannot by Tacking or Combining Its Rights Create Lawful Interstate Carriage To Evade State Regulation

What Petitioner has attempted to do in the instant case has been to combine certain parts of its I.C.C. certificates and put them together in such a fashion as to create a completely new and different right, to wit, the right to carry freight between the Philadelphia and Allentown areas.

Such a right to create interstate commerce in this manner has been questioned by your Honorable Court. In the Service Storage case, your Honorable Court, in re-emphasizing the meaning of the Eichholz case, stated: "There Missouri revoked a carrier's interstate permit because it crossed state lines into Kansas City, Kansas, for the sole purpose of creating an interstate operation."

In this case, Petitioner, by tacking, has attempted to create interstate commerce. This is what the Pennsylvania Public Utility Commission and Pennsylvania's appellate courts found objectionable.

The Interstate Commerce Act requires that all applicants seeking to render service as a common carrier by motor vehicle prove "present or future public convenience and necessity". Section 207, 49 U.S.C. §307. The legislative history is clear that this section was patterned after the motor carrier laws of the 46 states which had the same language. One of the committee members even stated to the legislators that

while different language would be more desirable, yet because of the well-defined meaning accorded to such language by the various states, it would be wise to incorporate that language the way it presently appears in the various state laws.

Yet, it is conceded that **Petitioner has never proved need or necessity for the transportation involved between Philadelphia and Allentown either before the Interstate Commerce Commission or the Pennsylvania Public Utility Commission.** Petitioner attempted to prove necessity for such transportation before the Pennsylvania Public Utility Commission but was unsuccessful. See *Modern Transfer Co. v. Pa. P.U.C.*, 179 Pa. Superior Ct. 46, 115 A. 2d 887 (1955).

Without proving necessity as required by the Interstate Commerce Act, Petitioner seeks to tack or combine its rights without let or hindrance. The validity of the doctrine of "tacking" as applied by the Interstate Commerce Commission has never been passed upon by your Honorable Court. And, of course, it would seem that if the "necessity" section of the Interstate Commerce Act was patterned after the laws of the various states, the I.C.C. should have rejected the doctrine of tacking as has been the unanimous decision of all the states considering the problem. See footnote 4.

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[4] California: *Re Western Motor Transport Co.*, PUR 1922 C. 12, 17; *In re California Transit Co.*, PUR 1923 A. 225; *Re Highway Transport Co.*, PUR 1926 B. 172, 182, 183; *Motor Service Express v. Baker*, PUR 1928 C. 531, 534-35.

Florida: *Central Truck Lines v. R.R. Commission*, 27 So. 2d 658; *Central Truck Lines, Inc. v. R.R. Commission*, 118 Fla. 555, 160 So. 26, 30 (1935); *Re St. Johns River Line Co.*, 7 PUR (NS) 268, 273 (1934).

It is not necessary in this case to rule upon the validity of the doctrine of "tacking"[5] since it is clear that Petitioner, even assuming its validity, may not utilize it here to evade state jurisdiction. Furthermore, a decision is not necessary on this point in view of Petitioner's failure to exhaust its administrative remedies.

Kentucky: *Hazard-Hyden Bus Co. v. Black*, 301 Ky. 426, 192 S.W. 2d 195, 196 (1946); *Eastridge v. Southeastern Greyhound Lines et al.*, 280 Ky. 392, 133 S.W. 2d 95, 97, 98 (1939).

Michigan: *Michigan Express v. Michigan P.S.C.*, 333 Mich. 101, 52 N.W. 2d 616, 619 (1952).

New York: *Yonkers R. Co. v. Hume*, PUR 1929 C, 665, 670, 225 App. Div. 313, 233 N.Y.S. 63 (1929).

North Carolina: *Re Youngblood Truck Lines, Inc.*, 18 PUR 3d 475, 484, 493, 494 (1957).

Ohio: *Pa. R.R. Co. v. P.U.C. of Ohio*, 116 Ohio St. 80, 155 N.E. 694, 697, 698 (1927)

Oklahoma: *Enid Transfer & Storage Co., Inc. v. State et al.*, 201 Okla. 274, 190 P. 2d 150, 152, 73 PUR(NS) 167 (1947).

Pennsylvania: *Lancaster Transportation Co. v. Pa. P.U.C.*, 169 Pa. Superior Ct. 284, 293, 82 A. 2d 291 (1951).

Texas: *Sunset Express, Inc. v. Gulf, C. & S. F. Ry. Co.*, Tex. Civ. App., 154 S.W. 2d 860, 863, 864 (1941); *R.R. Commission of Texas v. Red Arrow Freight Lines, Inc.*, Tex. Civ. App., 96 S.W. 2d 735, 738 (1936).

Washington: *North Bend Stage Line v. Washington M. Coach Co., Inc.*, 80 PUR(NS) 248, 254 (1949); *State v. Dept. of Transp.*, 26 Wash. 485, 174 P. 2d 516, 522 (1946).

Wyoming: *Application of Calhoun*, 51 Wyo. 448, 68 P. 2d 591 (1937).

[5] Even the doctrine of tacking, as evolved by the I.C.C. has been difficult to fathom for the experts. See the recent articles of Robert J. Bernard, "Tacking or Combining Interstate Operating Rights," Volume 26, I.C.C. Practitioners Journal, February 19, 19[illegible], page 521.

Whatever may be the arguments for "tacking" in promoting greater service in interstate commerce, by no sfretch of the imagination can it be utilized to create interstate commerce and evade the jurisdiction of the state involved over a matter which is essentially intrastate in nature. That the type of transportation involved in this case is basically intrastate in nature can be seen from the following excerpt in *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 666-668, 68 S. Ct. 1260, 92 L. Ed. 1633 (1948), with which neither the majority or minority disagreed:

> "From the standpoint of physical movement, there is a crossing of state lines and a journey over territory belonging to more states than one—a movement that is undeniably interstate. At the same time, however, the business of transporting passengers or freight between points in the same state is essentially local in character despite the interstate movement. All of the essential elements of the commercial intercourse represented by the continuous transportation are resident in that one state. The parties to the transportation contract, the making of the contract, and the service which is the subject of the contract are identified preeminently with that state. The whole purpose of the transaction is to transport the passengers or freight to a point within the same state as the point of origin. Passage through another state is a mere geographical incident in the consummation of this local transaction." (334 U. S. at 666.)

See also *Spector Motor Service v. O'Connor*, 340 U.S. 602, 610, 71 S. Ct. 508, 95 L. Ed. (1951).

"The sponsors of tacking never envisaged such results nor advocated that viewpoint. Tacking can only be used, if at all, to permit the interchange of shipments that already were (rather than thus became) interstate in nature. Tacking can certainly not be interpreted to be a tool to evade state license requirements when the whole purpose of the Federal Motor Carrier Act of 1935 was to fill the gaps between state and federal relations and when many of the sections of that Act contain assertions of federal-state cooperation and coordination.

For example, the National Transportation Policy set forth in the Federal Motor Carrier Act of 1935 (see 49 U.S.C. note preceding §301) states that one of the purposes of the Act is "to cooperate with the several States and the duly authorized officials thereof." Section 203 (b)(8), 49 U.S.C. §303(b)(8), makes that section applicable only if the motor carrier is "lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction". Further, Section 204(a)(4), 49 U.S.C. §304(a)(4), provides: "In any case where a motor carrier has become exempt from the provisions of this chapter as provided in this subparagraph, it shall not be considered to be a burden on interstate or foreign commerce for a State to regulate such carrier with respect to the operations covered by such exemption." Section 202(b), 49 U.S.C. 302(b), provides: "Nothing in this chapter shall be construed . . . to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power

of regulation of intrastate commerce by motor carriers on the highways thereof." Section 205, 49 U.S.C. §305, as well as many other sections of the Interstate Commerce Act evidence a clear and palpable desire on the part of the federal government to administer the Federal Motor Carrier Act in a manner complementary to state regulation.

The legislative history bears out the harmonious relationship that was intended by the Federal Motor Carrier Act. One of the Committee members stated on the floor of the House: "Mr. Hardan: Now, Mr. Speaker, the remark has been made that this is a bill for the railroads. This bill is endorsed by every organization of truck carriers that we know of; at least, all the prominent organizations of truck carriers. It protects every interest in the truck business. **It gives the States more rights to control intrastate commerce than they ever had before.** . . ." 79 Cong. Rec. 12197.

Another member stated: "Mr. Sadowski. The State commissions have asked Congress to pass this bill so that there may be **harmony** between States as to motor-carrier regulation. . . ." 79 Cong. Rec. 12204.

The Act is replete with instances manifesting Congressional respect for the dignity of the States in their respective spheres of regulation. To reason that by virtue of the self-created and amorphous doctrine of tacking, traditional state regulation can be defeated, would be to read out of the Federal Motor Carrier Act the underlying purpose behind its creation.[6] It would

[6] In *United States v. Shirey*, 79 S. Ct. 746 (1959), at page 749, your Honorable Court said: "The general purpose is

be tantamount to the states creating a Frankenstein monster which came alive to turn against them to their great harm and detriment.

The doctrine of tacking need not be further explored here. Suffice it to say, that whatever may be its legal status when utilized in a proper manner, it certainly cannot be utilized to evade state requirements. The basis of the decision of the Superior Court of Pennsylvania was simply that—"such tacking cannot supply a carrier with authority to transport property in intrastate commerce."

The Interstate Commerce Commission recognized the same principle in its decision in the Service Storage and Transfer Company case when it said: "In the absence of any showing that petitioner's use of its authorized route is a subterfuge to avoid state regulation. . . ." 7 M.C.C. 304, 306.

Before leaving the field of "tacking" it may be pointed out that "tacking" is a very insidious doctrine against which the states have very little ability to protect themselves. For example, a motor carrier may apply to the Interestate Commerce Commission for the additional right to go between Philadelphia

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more important aid to the meaning than any rule which grammar or formal logic may lay down."

In *Panhandle Eastern Pipe Line Co. v. Mich. P.S.C.*, 341 U.S. 329, at p. 335, 71 S. Ct. 777, 95 L. Ed. 933 (1951), the Court commented: "It would be an exceedingly incongruous result if a statute so motivated, designed and shaped to bring about more effective regulation, and particularly more effective state regulation, were construed in the teeth of those objects and the import of its wording as well, to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption."

and Burlington, New Jersey. The People of Pennsylvania would have no occasion to enter opposition. The same carrier could later apply for another segment of rights between Allentown and Hackensack, New Jersey. This again would find the people of Pennsylvania without any justifiable complaint. However, subsequently, the carrier may buy certain rights which would contain a route between Burlington, New Jersey, and Hackensack, New Jersey, which route may originate in Delaware and end ultimately in New York. Under the asserted doctrine of "tacking", this carrier would be able to actively carry on transportation between Philadelphia and Allentown by "tacking" the various segments together. Under these circumstances, the people of Pennsylvania and its carriers would be powerless to prevent this insidious process because they would never know the ultimate purpose in the mind of the carrier as each segment was acquired. When the fragments are pieced together allowing the carrier an entirely new and different right, the state directly involved is confronted with a *fait accompli.*

Because of the insidious effects the doctrine of tacking breeds, all the states which have had before it the question of the validity and propriety of tacking have unanimously rejected it. See footnote 4, supra. An excerpt from one such state decision which highlights the problem is given in the footnote.[7]

[7] In *Application of Calhoun*, 51 Wyo. 448, 68 P. 2d 591, 596 (1937), the Court said: "If the contentions of respondents above recited were to prevail, then it is easy to see that an individual or corporation could, by purchasing a number of certificates, each authorizing only local service, forthwith, as

Tacking, such as Petitioner has attempted to employ, if allowed to go unchecked, could readily destroy the efficacy of state regulation entirely and cause irreparable harm to the duly licensed intrastate carriers and the shipping and receiving public, and eventually the general public. The state is faced with undesirable adverse competition. The public is faced with deterioration in the quality of service resulting from duplication of facilities and destructive competition. The tacking carrier is free to limit its operations to the "cream" areas while the duly certified state carrier may have to serve the sparse and desolate areas as well. This diversion of profitable trade from the standard carrier renders the latter less able to fulfill its obligation to the public. The public is, of course, the group that will eventually suffer from the free-wheeling employment of tacking. Moreover, the public is often ignorant of the circuitous route used by the tacking carriers since such carriers usually advertise their service as "direct." The many evils that regulation was instituted to prevent are reappearing and will continue to appear. The vital local interests of the Commonwealth of Pennsylvania in a similar situation were clearly and forcefully recognized by your Honorable Court in *Panhandle Eastern*

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a matter of right, insist that he be permitted to combine them and operate a through service, notwithstanding traffic conditions might be such that if at the time these certificates were granted a through service certificate had been asked for, it would have been refused and properly so. The consequence of upholding contentions of this nature would be that the Public Service Commission of Wyoming would be rendered helpless to guard the interests of the public as contemplated by Chap. 65, Laws of Wyoming 1935."

Pipe Line Co. v. Mich. P.S.C., 341 U. S. 329, 71 S. Ct. 777, 95 L. Ed. 933 (1951), wherein it was said (341 U. S. at 334):

> "Thus, not only would there be two utilities using local facilities to accommodate their distribution systems, but they would be seeking to serve the same industrial consumers. Appellant asserts a right to compete for the *cream* of the volume business without regard to the local public convenience or necessity. Were appellant successful in this venture, it would no doubt be reflected adversely in Consolidated's over-all costs of service and its rates to customers whose only source of supply is Consolidated. This clearly presents a situation of 'essentially local' concern and of vital interest to the State of Michigan."

The interests of the Commonwealth of Pennsylvania are spelled out in the various provisions of the Pennsylvania Public Utility Law, such as, proof of necessity (§ 203, 66 P.S. § 1123); just and reasonable charges (§ 301, 66 P.S. § 1141); prohibition against discrimination (§304, 66 P.S. §1144); designation of statutory agent for service of process (§ 910, 66 P.S. § 1350); insurance and surety bonds (§ 915, 66 P.S. § 1355); rules and regulations issued by the Pennsylvania Public Utility Commission (§§901, 907, 66 P.S. §§ 1341, 1347).

Petitioner harbors the belief that even though it has been denied the right to ply between Philadelphia and Allentown directly, it can still accomplish this result through the obscure doctrine of tacking. The judges of the Commonwealth of Pennsylvania saw

through this obvious device of subterfuge and refused to sanction it. Petitioner, having failed before the Pennsylvania Public Utility Commission and the two appellate courts in this Commonwealth, is now seeking to persuade your Honorable Court on the highest level of our federal-state judicial structure to license that which has been categorized as a subterfuge. The facts in this case so palpably stamp Petitioner's activities as a subterfuge that the instant case cannot seriously be compared with the recent case of Service Storage and Transfer Company.

IV. The Record Fully and Amply Sustains the Finding of Subterfuge. Service Storage and Transfer Case Further Distinguished

In the case at bar Petitioner had previously applied to the Pennsylvania Public Utility Commission for the right to go directly between Philadelphia and Allentown. When this application was denied, Petitioner vigorously stepped up its "interstate" tacking program to justify intrastate operations. The evidence, however, remained uncontradicted: Petitioner had no terminal in New Jersey. The freight challenged was purely intrastate freight, having both origin and destination points in Pennsylvania. There was no commingling with interstate freight. There was no delivery to a re-distribution center. There were no deliveries in New Jersey. There were no pick-ups in New Jersey. In fact, there were no business stops in New Jersey at all. All the intrastate freight was transported from the Allentown terminal to the Philadelphia terminal in the same truck. There was no tie-up with interstate freight. There was no acceleration or facilitation of the movement of interstate freight connected with Petitioner's transportation. The route through New Jersey was twice as long and took almost twice as much time to traverse. No legitimate reason whatsoever was advanced for the movement of goods through New Jersey other than to create interstate transportation.

On the other hand, the case of Service Storage involved a carrier which had continued the same pat-

tern of operations as its predecessors, which methods were practical and efficient. Service Storage picked up freight in Virginia destined for Virginia points in combination with interstate freight destined for non-Virginia points. In fact, the great majority of freight carried was destined for non-Virginia points. The point-to-point Virginia freight only comprised 3% of the total freight carried by Service Storage. All the traffic thus picked up, was carried to the Bluefield, West Virginia, terminal of Service Storage, where it was unloaded and re-combined with other freight. The West Virginia terminal of Service Storage was not only its main terminal but the hub around which *all* its operations rotated. Freight coming in from all different parts of the country were sorted out and arranged by area so that its operations were prompt and economical. The Virginia point-to-point freight was consolidated with freight coming to the terminal from non-Virginia origins but destined for Virginia. The peddler runs and the over-the-road truck operations were designed to provide fast and efficient service on a geographical basis. Only 3% of all the traffic transported by Service Storage actually consisted of Virginia point-to-point freight. The evidence established that this freight was auxiliary and ancillary to the movement of freight in interstate commerce and was helpful in the making up of full truckload shipments, which tended to expedite and facilitate the flow of interstate merchandise. Your Honorable Court, after analyzing Service's operations, concluded as follows:

> "It stands uncontradicted that its (Service's) operation is not only practical, efficient and

profitable, but also that the creation of this 'flow of traffic' is a time-saver to the shipper since there is less time lost waiting for the making up of a full truckload. It also claims a unique service for less-than-truckload shipments of central Virginians who ship commodities to southwest Virginia and Kentucky who otherwise would suffer long delays on deliveries or would be obliged to ship by special truck at higher rates. While these considerations are not controlling, they throw light on petitioner's claim of bona fides."

No attempt will be made in this brief to belabor the obvious and glaring factual distinctions existing between the Service Storage case and the present one.

Summary and Conclusion

Our position summarized is that the Commonwealth of Pennsylvania can examine the facts to find out whether a carrier is evading its jurisdictional requirements and whether that carrier is doing it as a mere subterfuge or under specific authority from the Interstate Commerce Commission. In the instant case, the Commonwealth of Pennsylvania concluded that the Interstate Commerce Commission had not assumed control over the transportation involved and that Petitioner had undertaken the "intrastate" carriage through New Jersey as a subterfuge. The evidence was overwhelming in establishing subterfuge. Petitioner's self-serving attempt to tack to create interstate commerce must bow to the superior right of the state to protect its local interests. Petitioner further failed to exhaust its additional administrative remedy by applying to the Interstate Commerce Commission as aforesaid.

Your Honorable Court in the past has repeatedly denied petitions for writs of certiorari in similar cases, reaffirming the position of the Commonwealth of Pennsylvania. See *Ryan et al. v. Pa. P.U.C.*, 143 Pa. Superior Ct. 517, 17 A. 2d 637 (1940), certiorari denied, 314 U.S. 640, 62 S. Ct. 80, 86 L. Ed. 514 (1941); *Ryan v. Pa. P.U.C.*, 44 F. Supp. 912 (E. D. Pa. 1942), motion dismissed, 317 U.S. 702, 63 S. Ct. 162, 87 L. Ed. 561 (1942); *Atlantic Freight Lines v. Pa. P.U.C.*, 163 Pa. Superior Ct. 215, 60 A. 2d 589

(1948), certiorari denied, 336 U. S. 925; 69 S. Ct. 656, 93 L. Ed. 937 (1949).

The vitality of the Pennsylvania Ryan case was further strengthened by the citation of that case with approval by your Honorable Court in *Central Greyhound Lines v. Mealey*, 334 U.S. 653, 660, 80 S. Ct. 1260, 92 L. Ed. 633 (1948). The instant case is no different from the facts in these cases.

Wherefore, the respondent prays that your Honorable Court deny Petitioner's petition for a Writ of Certiorari.

And we will ever pray, etc.

Respectfully submitted,

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958.

No. [redacted]120

JONES MOTOR CO., INC.,
Petitioner,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondent,

and

HIGHWAY EXPRESS LINES, INC. and
MODERN TRANSFER COMPANY, INC.,
Intervening Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1958

No. 1005

JONES MOTOR CO., INC.,

Petitioner,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondent,

AND

HIGHWAY EXPRESS LINES, INC. AND MODERN TRANSFER COMPANY, INC.,

Intervening Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

I.

COUNTER-STATEMENT OF THE CASE.

On August 5, 1957, there was instituted a complaint against Jones Motor Company, Inc., petitioner herein, for transportation not authorized by its certificates of public convenience, in violation of Article II, Sections 202(b) and 202(c) of the Public Utility Law, Act of May 28, 1937, P. L. 1053, as amended (66 P. S. 1122(b) and 1122(c)).

Jones Motor Company, Inc., filed an answer thereto, in which it admitted the transportation but set up as a defense its certificates of public convenience and necessity issued by the Interstate Commerce Commission at Docket Nos. MC 4963 and MC 4963, Sub No. 7 (R. 18a).

Highway Express Lines, Inc. and Modern Transfer Company, Inc., holders of certificates of public convenience from the Pennsylvania Public Utility Commission, authorizing them to transport, as common carriers, property between certain designated points and areas within Pennsylvania, were granted leave to intervene on the ground that they were adversely affected by the alleged illegal activities of the petitioner.

Thereafter, hearings were held on February 3, 1958 and on June 30, 1958.

The complaint specifically charged Jones Motor Company, Inc., with 22 violations. The illegal shipments alleged included: (1) eleven shipments originating in Philadelphia destined for Allentown, Bethlehem, Easton and Catasauqua; (2) four shipments originating in Easton destined for Philadelphia and Hatboro; (3) three shipments originating in Bethlehem destined for Philadelphia; (4) one shipment originating in Oaks for Bethlehem; (5) one shipment originating in Emmaus for Philadelphia; (6) one shipment originating in Catasaqua for Philadelphia; and (7) one shipment originating in Chester for Bethlehem. Transportation of these shipments has been admitted.

Thereafter, on September 2, 1958, the Pennsylvania Public Utility Commission issued a Long Form Report and Order sustaining the complaint and ordering Jones Motor Company, Inc. to forthwith cease and desist the service for which the complaint was filed.

Jones Motor Company, Inc. appealed to the Superior Court of Pennsylvania from the Order of the Pennsylvania

Public Utility Commission of September 2, 1958 and subsequent thereto Highway Express Lines, Inc. and Modern Transfer Company, Inc. were permitted to intervene as appellees.

The Superior Court of Pennsylvania affirmed the Order of the Pennsylvania Public Utility Commission. Jones Motor Company, Inc. then filed a petition for allowance of an appeal and allocatur with the Pennsylvania Supreme Court. Said petition was denied. A petition for writ of certiorari followed.

II.

QUESTIONS PRESENTED.

In clarification of the questions presented, as set forth in petitioner's brief, the following questions are involved:

A. Whether or Not a Certificate of Public Convenience and Necessity Issued by the Interstate Commerce Commission Authorizing Transportation of Shipments in Bona Fide Operations May Be Utilized to Transport Shipments Between Points in the Same State Where the Use of Such Rights Is a Subterfuge to Avoid and Evade State Regulation.

B. Whether or Not a State May Lawfully Regulate Commerce on Its Highways Involving Transportation Between Two Points in Said State Where the Interstate Commerce Commission Has Not Assumed Jurisdiction to Determine Whether or Not the Operations Are Bona Fide Interstate Commerce.

C. Whether or Not Petitioner May in Its Petition for Certiorari Question the Jurisdiction of the Pennsylvania Public Utility Commission to Regulate Its Activities in Performing Transportation Between Two Points in the Same State Where Said Carrier Has

Failed During All Stages of the Proceedings Before the Pennsylvania Public Utility Commission and the State Courts to Request That State Action Be Enjoined by Seeking Appropriate Relief in the Federal Courts.

D. Whether or Not the Presented Petition Should Be Allowed Where the Uncontradicted Facts of Record Clearly Reveal No Abuse of Discretion by the Pennsylvania Public Utility Commission in Determining That Petitioner's Complained of Operations Were a Subterfuge to Avoid and Evade State Regulation.

III.
ARGUMENT.

A. Whether or Not a Certificate of Public Convenience and Necessity Issued by the Interstate Commerce Commission Authorizing Transportation of Shipments in Bona Fide Operations May Be Utilized to Transport Shipments Between Points in the Same State Where the Use of Such Rights Is a Subterfuge to Avoid and Evade State Regulation.

It has been universally held by the Pennsylvania Public Utility Commission, the Interstate Commerce Commission and the Federal Courts that a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizes only the transportation of bona fide interstate shipments: See *Ryan et al. v. Pa. P. U. C.*, 143 Pa Superior Ct. 517, 17 A. 2d 637, 39 PUR(NS) 455 (1940), allocatur to the Supreme Court of Pennsylvania refused and certiorari by the United States Supreme Court denied, 314 U. S. 640, 62 S. Ct. 80, 86 L. Ed. 514 (1941); *Atlantic Freight Lines v. Pa. P. U. C.*, 163 Pa. Superior Ct. 215, 60 A. 2d 589 (1948), allocatur to Supreme Court of Pennsylvania refused, certiorari denied by the United States Supreme Court, 336 U. S. 925, 69 S. Ct. 656, 93 L. Ed. 1087 (1949).

In *Service Storage & Transfer Company, Inc.—Petition for Declaratory Order*, 71 M. C. C. 304, the Interstate Commerce Commission in determining the right of Service & Storage Transfer Company, Inc. to perform transportation between two point in Virginia via an interstate route through West Virginia, had the following to say concerning the certificate of public convenience and necessity issued to the said carrier:

"This Commission has found in numerous proceedings that transportation of shipments in *bona fide* operations between points in the same State moving over authorized regular or irregular routes through another State or through an authorized gateway point in another State to which a carrier is authorized to transport a given shipment from a point in a particular State and from which it is authorized to transport the same shipment to a point in the same State, constitutes transportation in interstate commerce. Compare *Dixie Freight Lines, Inc., Common Carrier Application*, 24 M. C. C. 780, and *Atlantic Frt. Lines, Inc.—Petition for Declaratory Order*, 51 M. C. C. 175. In the absence of any showing that petitioner's use of its authorized route is a subterfuge to avoid State regulation, or other than a logical and normal operation through the carrier's headquarters, we are of the opinion that petitioner's operations, in the manner described, constitute *bona fide transportation in interstate commerce*. This conclusion finds support in the fact that the routes employed between Virginia points are not unduly circuitous or impracticable but on the contrary are such as might normally be used by any carrier authorized to operate between the Virginia points involved, and that Bluefield, W. Va., is petitioner's headquarters and the base of other substantial operations to and from points in Virginia of which the operations challenged are only a small part." (Italics supplied.)

It is thus clear that the certificate of public convenience and necessity issued to Jones Motor Company, Inc. by the Interstate Commerce Commission only authorizes "bona fide" operations. If in fact the use of the authorized interstate routes was a mere subterfuge to avoid State regulation, then of course the certificate of public convenience and necessity issued to it would not authorize such transportation. Where as here a subterfuge actually exists an administrative and judicial interpretation of such issue does not

in any way suspend or revoke the carrier's authority to operate in interstate commerce. It is merely an interpretation long recognized by the various administrative agencies and the Courts that where a subterfuge exists a certificate does not in fact authorize the complained of transportation. In such a situation the case of *Castle v. Hayes Freight Lines*, 348 U. S. 61 would have no application. An interpretation is not a suspension or revocation, particularly where as here the uncontradicted evidence clearly revealed that a subterfuge existed.

B. Whether or Not a State May Lawfully Regulate Commerce on Its Highways Involving Transportation Between Two Points in Said State Where the Interstate Commerce Commission Has Not Assumed Jurisdiction to Determine Whether or Not the Operations Are Bona Fide Interstate Commerce.

Congress in its legislative discretion did not completely preclude a State from regulating transportation on its highways, even if such transportation was through another State, particularly where as here the Interstate Commerce Commission has not been asked to and has not on its own motion assumed jurisdiction of the complained of operations.

The jurisdiction of the Interstate Commerce Commission over interstate transportation by motor vehicles, was conferred by the Federal Motor Carrier Act, 1935 (49 U. S. C. A. 301 et seq.).

49 U. S. C. A. 302 (b) reads:

> "Nothing in this Chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

In the present case, Jones Motor Company, Inc. has never formally or informally petitioned the Interstate Commerce Commission to administratively interpret its authority insofar as the complained of operations are concerned. It is clear that such action was open to Jones Motor Company, Inc. if it wished or desired that the Interstate Commerce Commission initially determine the controverted question. See *Atlantic Freight Lines, Inc.—Petition for Declaratory Order*, 51 M. C. C. 175; *Service Storage & Transfer Company, Inc.—Petition for Declaratory Order*, 71 M. C. C. 304.

Your Honorable Court has recognized this principle and has refused to review on at least two occasions the decisions of the Courts of the State of Pennsylvania in similar matters. (See *Rygn et al v. P. U. C.*, 314 U. S. 640 62 S. Ct. 80, 86 L. Ed. 514 (1941); *Atlantic Freight Lines v. Pa. P. U. C.*, 336 U. S. 925, 69 S. Ct. 656, 93 L. Ed. 1087 (1949).

It is also well to note that your Honorable Court did not reverse, interpret or distinguish the above two cases in the recent case of *Service Storage & Transfer Company v. Commonwealth of Virginia*, No. 92 October Term, 1958.

C. Whether or Not Petitioner May in Its Petition for Certiorari Question the Jurisdiction of the Pennsylvania Public Utility Commission to Regulate Its Activities in Performing Transportation Between Two Points in the Same State Where Said Carrier Has Failed During All Stages of the Proceedings Before the Pennsylvania Public Utility Commission and the State Courts to Request That State Action Be Enjoined by Seeking Appropriate Relief in the Federal Courts.

As set forth in the counter-statement of the case, the present controversy was initiated by the filing of a complaint by the Pennsylvania Public Utility Commission

against Jones Motor Company, Inc. Lengthy proceedings were held before the Pennsylvania Public Utility Commission.

Thereafter, Jones Motor Company, Inc. appealed the decision of the Pennsylvania Public Utility Commission to the Superior Court of Pennsylvania.

Thereafter, an appeal and request for allocatur was filed with the Supreme Court of Pennsylvania.

Now, for the first time in a Federal Court Jones Motor Company, Inc. raises the issue of the jurisdiction of the Pennsylvania Public Utility Commission to initially determine the controverted issue. It is true that the Federal question was raised at all times by Jones Motor Company, Inc. It is true that it contended at all times that it had the authority to perform the proposed operations because of its certificate of public convenience and necessity issued by the Interstate Commerce Commission but at no time was the right of the State agency and the State Courts to determine the issue ever questioned in a Federal Court. On the contrary, Jones Motor Company, Inc. urged both the Pennsylvania Public Utility Commission and the State Courts to decide the controverted question in its favor.

Jones Motor Company, Inc. did not at any time while the proceedings were pending before the Pennsylvania Public Utility Commission and the State Courts ask the Federal District Court or any other Federal Court to enjoin the Pennsylvania Public Utility Commission or the State Courts from exercising its jurisdiction in this matter. Such a procedure was open to Jones Motor Company, Inc. if it believed the Pennsylvania Public Utility Commission and the State Courts had no jurisdiction to determine the controverted issue. Further, the Interstate Commerce Commission at no time was asked to assume jurisdiction as was the case in *Atlantic Freight Lines, supra*, and *Service Storage Transfer Co., supra*. For these additional reasons the petition should be dismissed.

D. Whether or Not the Presented Petition Should Be Allowed Where the Uncontradicted Facts of Record Clearly Reveal no Abuse of Discretion by the Pennsylvania Public Utility Commission in Determining That Petitioner's Complained of Operations Were a Subterfuge to Avoid and Evade State Regulation.

The petitioner, Jones Motor Company, Inc. argues that the present proceedings should have been initially brought before the Interstate Commerce Commission pursuant to Section 204(c) of Part II of the Interstate Commerce Act. *Service Storage & Transfer Company, Inc. v. Commonwealth of Virginia, supra,* is cited for this proposition.

It is true that your Honorable Court in the above case stated that such a procedure would avoid confusion and is a proper remedy. It was not, however, conclusively determined that no determination could be made except in this manner. As has been recognized in numerous other cases, the carrier could at any time have petitioned the Interstate Commerce Commission for interpretation of its certificate in relation to the complained of operations. This it did not do. In the present case, however, neither procedure has been pursued and no party has urged that such procedures be adopted. Many and lengthy hearings have been held. The facts concerning the operation are practically uncontradicted. Under the circumstances, it would not be just or meet that the present proceedings be vacated and the case commenced anew. The facts proved before the Pennsylvania Public Utility Commission are before your Honorable Court. A reference to the uncontradicted facts will clearly reveal that a subterfuge existed and does exist. If the facts as now before you clearly reveal no abuse of discretion and if the facts reveal that a conclusion such as reached by the Pennsylvania Public Utility Commission would have to be reached by your Court upon judicial review, then it is clear that your Court may upon

the record and arguments presented in this petition for certiorari dispose of the matter finally and deny said petition. Certainly, Jones Motor Company, Inc., cannot object to your Honorable Court searching the facts and finding that no good cause exists from a factual point of view for the allowance of the present petition. If a procedure were adopted where the Interstate Commerce Commission initially determined the facts, then in the final analysis this Court would determine the legality of any conclusions reached. From the uncontradicted facts presented at this time, no good reason appears as to why the present proceedings should be vacated and since the facts are uncontradicted that a subterfuge exists, then the petition for certiorari should be promptly denied.

In the case of *Service Storage & Transfer Company, Inc. v. Commonwealth of Virginia, supra*, your Honorable Court reviewed the facts with appropriate comments. The proceeding was not remanded and a review of the facts was made with appropriate findings. The facts in the present case are clearly distinguishable from those in *Service Storage & Transfer Company, Inc. v. Commonwealth of Virginia, supra.*

Since full hearings have been held in this matter, it is particularly important that the proceedings before the Pennsylvania Public Utility Commission remain undisturbed. If Section 204(c) of the Interstate Commerce Act, 49 U. S. C. 304(c) were invoked, there is a possibility that such procedure would involve further long, drawn-out hearings without opportunity for an effective Order to be entered by the Interstate Commerce Commission, should it decide that the complained of operations were a subterfuge. In a proceeding under the above Section, the Interstate Commerce Commission would only have the power to determine that such transportation was not interstate commerce but was intrastate commerce. The violations involved then would be merely a matter of State law, namely,

performing transportation between two points in Pennsylvania without having first obtained a certificate of public convenience and necessity from the State Commission. This was the basis for the original complaint filed by the Pennsylvania Public Utility Commission. Since the only finding that the Interstate Commerce Commission could make would be that of a violation of State law, it would be powerless to provide penalties. It would have no authority either to issue a cease and desist order or invoke penalties for the performing of intrastate transportation between points in Pennsylvania without having first obtained a State certificate. The only alternative would probably be for the entire proceeding to commence anew. With the facts now before this Court on the present petition, a final determination can now be made. If the facts sustain the finding that a subterfuge exists then the applicable law can well be applied without the granting of this petition.

The uncontradicted facts with reference to the appropriate pages of the Record are set forth below.

As stated *supra*, when the actual physical movement of the vehicle crosses the State line and back again the question of whether it thereby escapes State regulation depends on whether the movement was "bona fide". Whether the movement was "bona fide" cannot be permitted to depend on the carrier's state of mind. The test must be whether an ordinary prudent carrier not restrained by regulation would use the circuitous route. The simple and easy test is not what the carrier says his purpose is but by what it appears to be from looking at any ordinary highway map.

With the law apparently clear and all factors as considered in other cases to have been established, it now becomes necessary to analyze the testimony taken at the hearings before the Pennsylvania Public Utility Commission to determine the circumstances surrounding the complained of transportation.

The complaint filed by the Pennsylvania Public Utility Commission specifically charged Jones Motor Company, petitioner, with 22 separate violations involving transportation between points in Pennsylvania by routes partially within the State of New Jersey (R. 1a).

Jones Motor Company, Inc., petitioner, has admitted that the transportation complained of involved shipments picked up in Pennsylvania and delivered in Pennsylvania but performed partially through routes in the adjoining State of New Jersey (R. 143a).

Jones Motor Company, Inc., petitioner, through its attorney and throughout the record, has admitted that the 22 instances of transportation complained of involve direct movements between terminal areas in Pennsylvania without any pickups or dropoffs being made at any time on the routes in the adjoining State of New Jersey (R. 217-218).

The record is clear likewise that of the 22 instances of transportation complained of there were no shipments on the trucks involving any interstate shipments as such. Each of the shipments had both origin and destination in Pennsylvania. It is true there is some vague evidence that Jones Motor Company, Inc. at some time does have interstate traffic on the vehicles operating between the Pennsylvania terminals. This was never corroborated by any documentary proof and in fact, the testimony of the witness for Jones Motor Company, Inc. clearly reveals that there just were not any interstate shipments involved in the complained of transportation. The testimony of this witness as shown on the record at 217a and 218a is as follows:

> "A. Not all the time. On these particular days they would have to do that because those trucks move during the night and any traffic for that route is delivered the next day. But, other trucks deliver, that is correct.
>
> Q. But any of the trucks that moved under the circumstances shown on the complaint would be re-delivered from Allentown?

A. If there was any traffic on there.
Q. You have no record of those?
A. We didn't think it necessary.
Q. Your answer to the question is simply yes.
A. (No response.)"

Likewise, it was admitted that the routing between the Philadelphia area and the Allentown-Bethlehem-Easton area involved Route 222 from Allentown to Easton and thence to Clinton, New Jersey, and thence via Route 69 to Trenton, New Jersey, and thence Route 1 to Philadelphia, the same route being used in reverse in the northbound direction (R. 143a). However, Jones Motor Company, Inc. admits that it has no terminal located at the tacking point of its interstate authorities, namely, Clinton, New Jersey, nor does it utilize any terminal in New Jersey nor is New Jersey the "hub" of any of its operations. (See R. 95a and R. 176a.)

As a matter of fact, the "hub" of the operations of Jones Motor Company, Inc., if any exists for shipments from Pennsylvania to points in New Jersey, is the Allentown, Pa. terminal, according to the testimony of the only witness for Jones Motor Company, Inc., petitioner. If this is true, then all the more so the use of the circuitous routes in New Jersey is unjustified.

Likewise, it was established by stipulation of counsel for Jones Motor Company, Inc. and the intervening appellees the distances involved over the circuitous routes utilized by Jones Motor Company, Inc. and the distances over the more direct and normal routes between the Philadelphia area and the Allentown-Bethlehem-Easton area (see stipulation of counsel R. 229a-R. 233a). The distance via the circuitous routes through New Jersey measure approximately 100 miles as compared to 55 miles by the usually traveled most direct intrastate route. (See stipulation of counsel R. 229a-R. 233a and as shown in the findings of the Pennsylvania Public Utility Commission R. 299a.)

Further, by stipulation of counsel the actual normal driving time was admitted in evidence showing the time over the more circuitous route through New Jersey, as well as the normal driving time over the more direct intrastate routes wholly within the State of Pennsylvania. The average driving time via the circuitous route through New Jersey takes approximately 3 hours and 30 minutes, as compared to 2 hours and 15 minutes by the direct intrastate routes. (See stipulation of counsel R. 229a-R. 233a and as shown in the findings of the Pennsylvania Public Utility Commission R. 299a.)

Jones Motor Company, Inc. never attempted to prove any legitimate reason for using the more circuitous routes through New Jersey. The sole reason advanced by it for such a routing appears to be that such routes were authorized by the Interstate Commerce Commission.

It is further shown conclusively that the routing through New Jersey is not the normal route that a prudent carrier would use by the fact that on May 17, 1950 Jones Motor Company, Inc. filed an application with the Pennsylvania Public Utility Commission for amendment of its certificate at application Docket No. 59731, Folder 8, Am-A and Folder 9, Am-A, so as to permit transportation of property between the Philadelphia area and the Allentown-Bethlehem-Easton areas via routes solely within the State of Pennsylvania. Apparently this appeared to even Jones Motor Company, Inc. to be the normally operated routes that a prudent carrier would utilize. The Pennsylvania Public Utility Commission under date of August 23, 1954 issued an Order authorizing such transportation over routes wholly within the State of Pennsylvania. Thereafter, an appeal was taken to the Superior Court of Pennsylvania from said Order and after argument the Order of the Pennsylvania Public Utility Commission was reversed and the application denied. (See *Modern Transfer Company v. P. U. C.*, 179 Pa. Superior Ct. 46, 115 A. 2 887 (1955).)

It was only after the denial of the intrastate application that Jones Motor Company, Inc. became an active competitor between the same areas via the use of the circuitous route through New Jersey. It is also well to note that Jones Motor Company, Inc., stated that the operations via interstate routes through the State of New Jersey had commenced prior to this application but it is further well to note that no documented proof of any kind was presented to substantiate this statement.

On the basis of the above testimony, it is inescapable that the only conclusion that reasonable and fair minds could reach is that Jones Motor Company, Inc.'s use of the circuitous interstate route was and is a subterfuge to avoid State regulation.

The evidence has failed to reveal that the circuitous route was a logical and normal operation. The evidence has failed to prove that the routes were not circuitous and impractical. The evidence has failed to prove that the circuitous routes were those that would normally be used by a prudent and efficient motor carrier.

Under the circumstances, the facts fully justify the Order of the Pennsylvania Public Utility Commission. The Order based upon such facts is fully in accord with the prior decisions of the State Courts and the most recent decision referred to, *supra*, of the Interstate Commerce Commission.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 120

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v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondent

and

HIGHWAY EXPRESS LINES, INC. and
MODERN TRANSFER COMPANY, INC.,
Intervening Respondents

PETITIONER'S REPLY TO RESPONDENT'S AND INTERVENING RESPONDENTS' BRIEFS IN OPPOSITION

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PETITIONER'S REPLY TO RESPONDENT'S AND INTERVENING RESPONDENTS' BRIEFS IN OPPOSITION

RESPONDENT'S AND INTERVENING RESPONDENTS' CONTENTIONS

Briefly stated, Respondent and Intervening Respondents assert that the Petition should be denied for five principal reasons. These are:

1. That there is no authority in Petitioner to tack or combine the interstate certificates upon which the interstate operation is predicated.

2. That the uncontradicted facts of record are that a subterfuge exists.

3. That the mode of operation of the interstate routes in question is not proper and does not establish a bona fide operation.

4. That other remedies are available at this stage.

5. That *Service Storage and Transfer Co., Inc. v. Commonwealth of Virginia*, 359 U. S. 171, does not mean what it says.

ARGUMENT IN REPLY

1. The Tacking of Petitioner's Interstate Routes Is Proper and in Accordance With the Applicable Law

That Petitioner, in fact, properly has combined its base certificate at MC 4963 and MC 4963, Sub 7 in accordance with the applicable law cannot be doubted. The Interstate Commerce Commission has decided this question in clear and unmistakable terms in *Transport Corporation of Virginia—Extension—Maryland*, 43 MCC 716, 719 in these words:

> "It is well settled that regular-route motor common carriers may operate over all combinations of their separately described routes and between all authorized points thereon, unless their service is specifically restricted in some particular. Powell Bros. Truck Lines, Inc.—Purchase—Bryan, supra. The same principle has been applied to regular-route common-carrier operations acquired by purchase, merger, or in proceedings under section 207(a) of the act. Days Transfer, Inc.—Purchase—Haner, 39 M.C.C. 339; Dixie Freight Lines, Inc., Common Carrier Application, 24 M.C.C. 780. And, it has been held generally in motor-carrier proceedings under sections 5 and 212(b) of the act that where common-carrier regular-route and

irregular-route authorities, or two or more common-carrier, irregular-route authorities are unified for operation by one carrier, through service may be provided between authorized points in both of such authorities, unless the public interest requires the imposition of a restrictive condition against the rendition of through service in whole or in part. The only requirement in these instances has been that there must be a point of service common to both operating authorities and the physical operation must be rendered through such common point. Carolina Freight Carriers Corp.—Purchase—Edmonds, 36 M.C.C. 259, B & E Transp. Co., Inc.—Purchase—Merchants Transp., Inc. 36 M.C.C. 561; and Consolidated Freightways, Inc.—Purchase—Pacific I. Exp., 38 M.C.C. 577."

See also *Aetna Freight Lines, Inc., Interpretation of Certificate*, 48 MCC 610; *Blewett—Purchase—Hester Truck Lines, Inc.*, 37 MCC 763; *Northern Transportation Co.—Purchase (Portion)—Mikulich*, 50 MCC 375; *Breeding Motor Freight Lines, Inc.—Purchase—Lee Way Motor Freight, Inc.*, 50 MCC 477.

The interpretation followed in the *Transport Corporation* case, *supra*, has also been followed by the Federal courts in *Century-Matthews Motor Freight* v. *Thrun*, 173 F. 2d 454 and *Interstate Common Carrier Council* v. *U. S.*, 84 F. Supp. 414, 420.

Moreover, in the instant matter the Interstate Commerce Commission specifically authorized combination of Petitioner's base certificate at MC 4963 with its certificate at MC 4963, Sub 7 in MC-F-4955, wherein the following language appears:

"Upon consummation of the purchase, Jones Motor Co., Inc., will be entitled to operate under

the operating rights granted at No. MC-108161, which rights are herein authorized to be unified with rights otherwise confirmed in it and to be embraced in a certificate in its name with duplications eliminated."

Despite Respondents' contention to the contrary, it is evident from this quotation that the "it" referred to can and does apply only to Jones Motor Co., Inc.; otherwise, the authorization is meaningless since Jones was the purchaser.

2. There Is No Evidence of Subterfuge in the Instant Record

Despite numerous statements by Respondent and Intervening Respondents indicating that the facts are uncontradicted that a subterfuge exists, it is significant to note that these Respondents initially presented no evidence but, upon conclusion of Petitioner's case, presented certain testimony by stipulation and additional testimony by incorporation into the record by reference.

The testimony received by stipulation was evidence of the mileage via Jones Motor Co., Inc.'s interstate routes and the driving time involved over those routes and evidence of mileage via a route lying wholly within Pennsylvania and the driving time involved over that route. The evidence incorporated by reference consisted solely of the operating authorities and tariffs of Intervening Respondents, the applications of Jones Motor Co., Inc. at A. 59731, Folder 8 and Folder 9, Am-A, the Order of Pennsylvania Public Utility Commission granting the authority sought and the opinion of the Pennsylvania Superior Court in *Modern Transfer Company* v. *Pennsylvania Public Utility Commis-*

sion, 179 Pa. Superior Ct. 46, 115 A. 2d 887 (1955) reversing the Commission.

None of this evidence does or can prove that a subterfuge existed. Respondent and Intervening Respondents allege that since Jones Motor Co., Inc. made application for an intrastate route between Allentown and Philadelphia, and since the authority granted was reversed by Pennsylvania Superior Court in the *Modern Transfer* case, *supra*, that this fact, standing alone, proves that the interstate operation was a subterfuge.

The fact of the matter is that the interstate operations have been conducted continuously since 1952 (R. 96a-97a) and the Pennsylvania Superior Court did not reverse the grant of the intrastate authority by Pennsylvania Public Utility Commission until 1955, some three years after the operation had been instituted under Interstate Commerce Commission authority and rates duly filed with the Interstate Commerce Commission.

Wherein is the subterfuge?

3. The Jones Interstate Operation Was Bona Fide and the Assertions Concerning It Are Not Supported by the Record

The uncontradicted facts of record in this proceeding reveal that operations over the interstate routes in question have been conducted continuously by Jones Motor Co., Inc. since 1952 (R. 96a-97a). The routes employed were checked with the Interstate Commerce Commission prior to the initiation of service (R. 164a; 208a; 91a). Such operations were conducted on a daily basis over the interstate routes in question and the same vehicles carried freight destined to points other

than those named in the Complaint for delivery in interstate commerce (R. 90a). Moreover, interstate interline traffic to and from other carriers also is handled by Jones Motor Co., Inc. in its operation under these same interstate routes (R. 90a). The routes in question are published as interstate routes in Middle Atlantic Tariff Conference Tariff No. 16, an interstate publication (R. 90a-91a).

Traffic handled, for example, from Philadelphia to points such as Phillipsburg, New Jersey and other points along the interstate routes is distributed from the Allentown terminal of Jones (R. 205a-206a).

The interstate routes initially operated through Clinton, New Jersey due to the location of a terminal at that point (R. 163a-164a; 208a). The Clinton, New Jersey terminal subsequently was closed because operations best could be conducted from the Jones terminal at Allentown, Pennsylvania from an economic standpoint (R. 176a). The routes continue to operate via Clinton, New Jersey (R. 96a-97a) and equipment is maintained at Philipsburg, New Jersey (R. 176a).

Drivers' logs, required by the Interstate Commerce Commission, are kept and the logs prove that the interstate routes are observed. Tach-o-graphs are used on the road vehicles and the mileages indicated thereon prove that the interstate routes are observed (Complainants' Exhibits C-1, C-2, C-3, C-4; Respondent's Exhibit 6).

In each of the movements averred in the Complaint interstate rates, duly published in interstate tariffs, were charged and collected (R. 82a; Respondent's Exhibit 5).

The combination of the routes is predicated, as aforementioned, on the specific authorization granted by the Interstate Commerce Commission in MC-F-4955, supra. Not only were the routes in question checked prior to the institution of service, but Respondent's Exhibit 4, erroneously excluded from evidence, establishes clearly that the responsible representatives of the Interstate Commerce Commission still are of the opinion that the transportation involved is interstate in nature.

4. The Instant Petition Is Properly Filed

Having instituted the Complaint, prosecuted it through its own attorneys, heard it before its own Examiners and decided it itself, Pennsylvania Public Utility Commission now feels that the instant Petition should be denied because Jones Motor Co., Inc. should have sought yet another authorization from the Interstate Commerce Commission.

What this contention in reality amounts to is that a Petition for Writ of Certiorari, duly filed and directed against the highest appellate courts of a State, should not be granted because there is some possibility that the petitioner would have access to the Interstate Commerce Commission. To adopt this reasoning would be to make it mandatory for a petitioner to appeal from the highest court in his State to the Interstate Commerce Commission as an intermediate step before an appeal or petition could be lodged with your Honorable Court.

A second alternative proposition is that this Petitioner should seek an injunction before a Federal court.

Throughout, Jones Motor Co., Inc. has raised the Federal question, has pursued its remedies before the Pennsylvania appellate courts and properly has filed its Petition for Writ of Certiorari from the opinion of the Superior Court of Pennsylvania by reason of the denial of allocatur by Pennsylvania Supreme Court, the only remaining Pennsylvania court which could have afforded a remedy.

The Petition is properly filed for the further reason that the Superior Court of Pennsylvania has decided a Federal question, contrary to an applicable decision of your Honorable Court, and further by reason of the fact that the denial of allocatur by the Supreme Court of Pennsylvania has resulted in the exhaustion of Petitioner's remedies before the Pennsylvania appellate courts, as previously mentioned in the Petition for Writ of Certiorari.

5. Service Storage and Transfer Co., Inc. v. Commonwealth of Virginia, Supra, Is the Applicable Decision, Which Has Been Ignored, and Means What It Says

In the course of the opinion by your Honorable Court in the *Service Storage* case, *supra,* it was indicated that proceedings such as the instant one should be brought by the appropriate State agency before the Interstate Commerce Commission pursuant to Section 204(c) of Part II of the Interstate Commerce Act. At page 6 your Honorable Court stated:

> "It appears clear that interpretation of Federal certificates of this character should be made in the first instance by the authority issuing the certificate and upon whom the Congress has placed the responsibility of action."

Instead of proceeding before the Interstate Commerce Commission in the manner suggested by your Honorable Court in the *Service Storage* case, *supra*, the Respondent and Intervening Respondents would ignore the judgment of your Honorable Court and insist upon the right of the Pennsylvania Public Utility Commission, as Complainant, prosecutor and judge, to nullify the effect of rights granted by the Interstate Commerce Commission.

CONCLUSION

Pennsylvania Public Utility Commission does not contend here that it has decided a case which does not involve a Federal question. It appears to contend that it has the right to determine a Federal question and, having done so on its own motion, its decision is not reviewable by your Honorable Court despite the *Service Storage* case, *supra*.

Respondent was the original prosecutor and chose to be its own forum. Petitioner had a right to expect that Pennsylvania Public Utility Commission would recognize the validity of the Jones Interstate Commerce Commission authority. When the Pennsylvania Commission rendered its decision refusing to do so, Petitioner was obliged under Pennsylvania law to appeal to the Superior Court of Pennsylvania and, in turn, to the Supreme Court of Pennsylvania or it would have been confronted with the contention that it had not exhausted its remedies in Pennsylvania. Since neither the Pennsylvania Commission nor the Pennsylvania appellate courts have recognized the binding effect of the judgment of your Honorable Court in the *Service Storage* case, *supra*, the only remaining protection available to Petitioner is an argu-

ment on the merits before your Honorable Court upon issuance of the Writ prayed for.

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PETITION FOR RECONSIDERATION AND CLARIFICATION.

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Intervening Respondents.

PETITION FOR RECONSIDERATION AND CLARIFICATION.

1. On October 12, 1959, at No. 120 October Term, 1959, your Honorable Court, in a Per Curiam memorandum order, granted the petition for writ of certiorari in the above-styled cause and, simultaneously, reversed the judgment of the court below, merely citing *Service Storage and Transfer Company, Inc. v. Virginia*, 359 U. S. 171 (1959).

2. Highway Express Lines, Inc. and Modern Transfer Company, Inc. were at all stages parties to the proceeding.

3. The Pennsylvania Public Utility Commission has timely filed a Petition for Reconsideration and Clarification of the Per Curiam opinion entered on October 12, 1959.

4. Said petition sets forth urgent and immediate reasons why the opinion should be clarified.

5. Highway Express Lines, Inc. and Modern Transfer Company, Inc. request reconsideration and clarification of the Per Curiam opinion of October 12, 1959 for the same reasons and on the same basis as set forth in the petition of the Pennsylvania Public Utility Commission.

WHEREFORE, Highway Express Lines, Inc. and Modern Transfer Company, Inc. respectfully pray your Honorable Court file a clarifying opinion or order so all parties will know the basis of the decision for the purpose of any further action that may be required in the premises.

Respectfully submitted,

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Attorneys for Intervening Respondents.

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PETITION FOR RECONSIDERATION AND CLARIFICATION

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PETITION FOR RECONSIDERATION AND CLARIFICATION

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2. Reference being made to *Service Storage*, it appears that the express holding thereof was that the transportation complained of was not to be challenged in a state tribunal, but only before the Interstate Commerce Commission, the opinion of your Honorable Court stating:

> "We agree with the petitioner that under the facts here the interpretation of petitioner's interstate commerce certificate should first be litigated before the Interstate Commerce Commission under the provision of §204(c) of the Interstate Commerce Act, 49 U.S.C. §304(c)." Page 173.
>
> "It appears clear that interpretations of federal certificates of this character should be made in the first instance by the authority issuing the certificate and upon whom the Congress has placed the responsibility of action." Page 177.

3. Seemingly to underscore the fact that the holding of your Honorable Court was posited upon want of jurisdiction in the tribunals of the Commonwealth of Virginia, and that the Commonwealth still might and may challenge petitioner's operation, the opinion concluded with the following declaration:

> "Finally, the Commonwealth is not helpless to act. If it believes that petitioner's operation is not bona fide interstate but is merely a subterfuge to escape its jurisdiction, *it can avail itself* of the remedy Congress has provided in the Act." Page 179, emphasis supplied.

4. There are, however, *obiter dicta* in *Service Storage* which may be interpreted to bear on or prejudge the merits of that controversy; which are irrelevant to deciding whether the state tribunal had, or did not have jurisdictional power (as distinguished from its proper exercise of such power); and which tend to imply that recourse to the Interstate Commerce Commission by the state would in that controversy be unavailing: *e.g.*, the discussion of petitioner's subjective intent at pages 175-176, which, indeed, concludes with the disclaimer that "[w]hile these considerations *are not controlling*, they throw light on petitioner's claim of bona fides" (emphasis supplied). Manifestly, even bad faith in petitioner would not create jurisdictional power in a state tribunal, nor would petitioner's good faith vitiate such power if it otherwise existed.

5. The Commonwealth of Pennsylvania, through its Public Utility Commission, is now commencing

complaint proceedings before the Interstate Commerce Commission to challenge the operation of Jones Motor Co., Inc. for the reasons set forth in the Pennsylvania Commission's brief filed with your Honorable Court in the instant cause. Whether such operation is "practical, efficient, and profitable"—to employ the words of the *dictum* at page 176 of the opinion of your Honorable Court—has no bearing on the question whether such operation *has been authorized* by the Interstate Commerce Commission, which is the primary question in the present controversy; and has little bearing on the collateral question of subterfuge in crossing "state lines . . . for the sole purpose of *creating* an interstate operation" (page 178 of the opinion of your Honorable Court) because a carrier has no incentive to perpetrate a subterfuge which is not sufficiently practical and efficient to be *profitable*. This *dictum*, and others, may mislead, or be used to mislead, the parties to the forthcoming proceedings before the Interstate Commerce Commission, or that tribunal itself, into supposing that the order of your Honorable Court in the instant cause looked to the merits thereof, instead of being limited to the jurisdictional issue which was the true rationale of *Service Storage*.

WHEREFORE, Pennsylvania Public Utility Commission, by its counsel, respectfully prays your Honorable Court to file a clarifying opinion or memorandum order expressly stating that the judgment of the court below was reversed on jurisdictional grounds, without regard to the merits of the controversy in the instant cause.

And it will ever pray, *etc.*

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28th October 1959